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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 193⁸

No. 796 7

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C.
BRADNEY, ET AL., PETITIONERS,

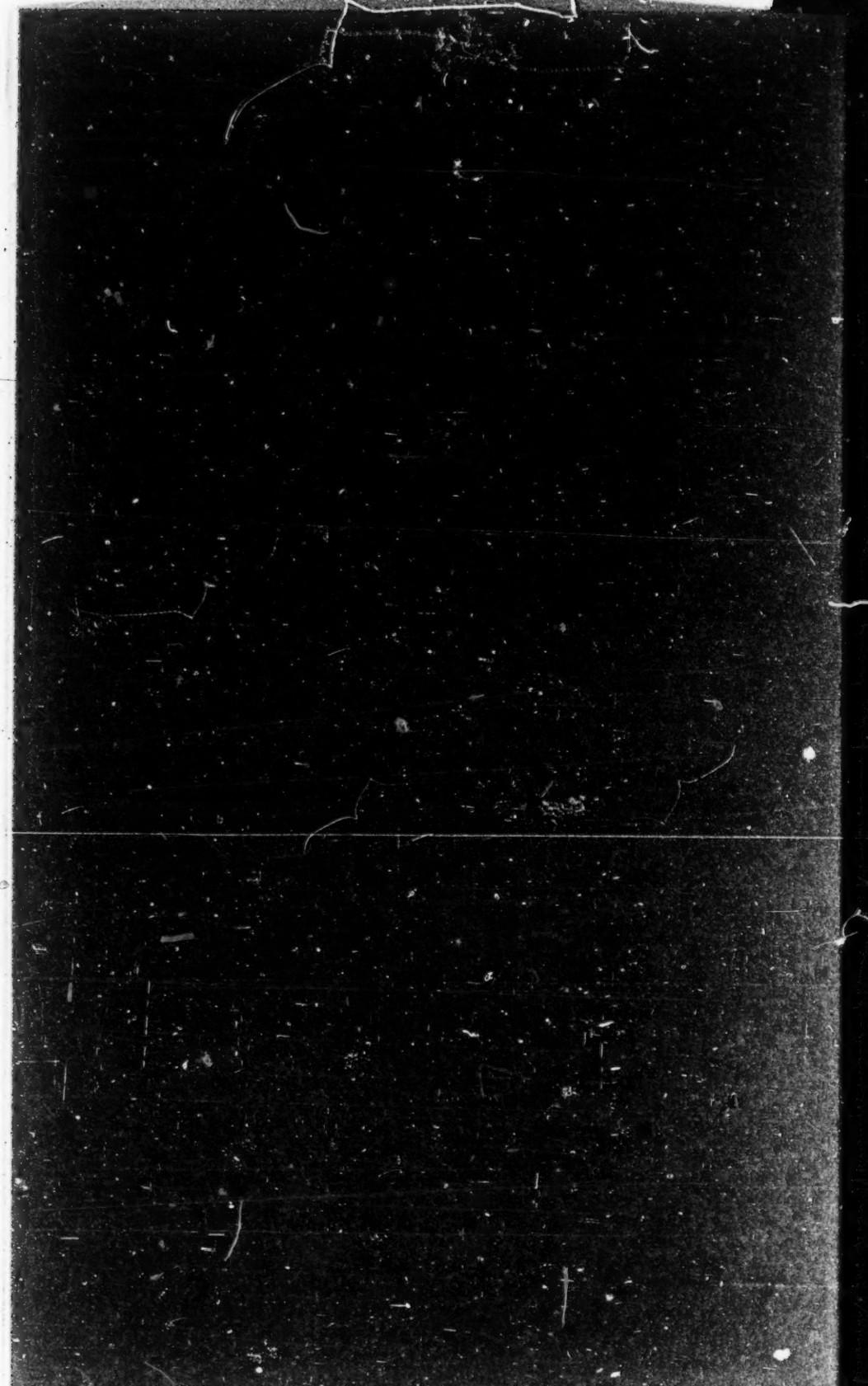
vs.

CLARENCE W. MILLER, AS SECRETARY OF THE
SENATE OF THE STATE OF KANSAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF KANSAS

PETITION FOR CERTIORARI FILED FEBRUARY 12, 1938.

CERTIORARI GRANTED MARCH 28, 1938.



SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1937
No. 796

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C.
BRADNEY, ET AL., PETITIONERS,

vs.

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a.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 33,459

COLLA W. COLEMAN, W. A. BARRON, CLAUDE C. BRADNEY,
J. B. Carter, Wilfrid Cavaness, Kirk W. Dale, Jesse C.
Denious, Benjamin F. Endres, Ewing Herbert, W. E.
Ireland, Walter F. Jones, Walter E. Keefe, Fred R.
Nuzum, Ernest F. Pihlblad, G. W. Schmidt, Thale P. Skov-
gard, Harry M. Tompkins, Ray G. Tripp, Robert J. Ty-
son, N. B. Wall, Raimon G. Walters, George W. Plum-
mer, Frank C. Pomery and A. W. Relihan, Plaintiffs,

vs.

LARENCE W. MILLER, as Secretary of the Senate of the
State of Kansas; William M. Lindsay, Lieutenant-
Governor and President ex-officio of the Senate of the
State of Kansas; H. S. Buzick, Jr., as Speaker of the
House of Representatives of the State of Kansas; W. T.
Bishop, as Chief Clerk of the House of Representatives
of the State of Kansas, and Frank J. Ryan, as Secretary
of the State of Kansas, Defendants

Be it Remembered, that on the 26th day of February, 1937,
there was filed in the office of the Clerk of the Supreme
Court of the State of Kansas, a Petition for Writ of Mandamus,
a copy of which Petition for Writ of Mandamus
(omitting signatures) appears at pages one (1) to eleven
(11) inclusive of the Abstract of the Record prepared by
the plaintiff, incorporated herein.

[Vol. b] Be it Further Remembered, that afterward and on
the 19th day of May, 1937, there was filed in the office of the
Clerk of the Supreme Court of the State of Kansas, an Ab-
stract of the Record, prepared by the plaintiff herein, a copy
of which Abstract of the Record, is in the words and figures
as follows, to-wit:



IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 33,459.

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C. BRADNEY,
J. B. CARTER, WILFRID CAVANESS, KIRKE W. DALE,
JESSE C. DENIQUIS, BENJAMIN F. ENDRES, EWING HER-
BERT, W. E. IRELAND, WALTER F. JONES, WALTER E.
KEEF, FRED R. NUZMAN, ERNEST F. PIHLBLAD, C. W.
SCHMIDT, THALE P. SKOVGARD, HARRY M. TOMPKINS,
RAY C. TRIPP, ROBERT J. TYSON, N. B. WALL, RAIMON C.
WALTERS, GEORGE W. PLUMMER, FRANK C. POMEROY and
A. W. RELIHAN,
Plaintiffs,

vs.

CLARENCE W. MILLER as Secretary of the Senate of the State of Kansas, WILLIAM M. LINDSAY, as Lieutenant-Governor and President ex-officio of the Senate of the State of Kansas, H. S. BUZICK, JR., as Speaker of the House of Representatives of the State of Kansas, W. T. BISHOP as Chief Clerk of the House of Representatives of the State of Kansas, and FRANK J. RYAN as Secretary of State of the State of Kansas; and the STATE OF KANSAS,
Defendants.

ORIGINAL PROCEEDINGS IN MANDAMUS.

ABSTRACT OF RECORD.

On the 26th day of February, 1937, the plaintiffs filed in this court their petition in the above entitled action, which was as follows:

Come now the plaintiffs and for their cause of action against the defendants allege that:

I.

Each and all of said plaintiffs and defendants are residents and citizens of the State of Kansas; that each of them is and at all times hereinafter referred to was a duly elected, qualified and acting member of either the Senate of the State of Kansas or of the House of Representatives of the State of Kansas, as indicated below. The postoffice address and official position of each of the plaintiffs is as follows:

Name	Official Position	Postoffice Address
Rolla W. Coleman	Senator	Overland Park
W. A. Barron	Senator	Phillipsburg
Claude C. Bradney	Senator	Columbus
J. B. Carter	Senator	Wilson
Wilfrid Cavaness	Senator	Chanute
Kirke W. Dale	Senator	Arkansas City
Jesse C. Denious	Senator	Dodge City
Benjamin F. Endres	Senator	Leavenworth
Ewing Herbert	Senator	Hiawatha
W. E. Ireland	Senator	Yates Center
Walter F. Jones	Senator	Hutchinson
Walter E. Keef	Senator	Glen Elder
Fred R. Nuzman	Senator	Ottawa
Ernest F. Pihlblad	Senator	Lindsborg
G. W. Schmidt	Senator	Junction City
Thale P. Skovgard	Senator	Greenleaf
Harry M. Tompkins	Senator	Council Grove
Ray G. Tripp	Senator	Herington
Robert J. Tyson	Senator	Parker
N. B. Wall	Senator	Sedan
Raimon G. Walters	Senator	Garden City
George W. Plummer	Representative	Perry
Frank C. Pomeroy	Representative	Holton
A. W. Relihan	Representative	Smith Center

The defendant, Clarence W. Miller, is and at all times hereinafter referred to was the duly elected, qualified and acting Secretary of the Senate of the State of Kansas.

II.

The legislature of the State of Kansas consists of a Senate and a House of Representatives. The Senate of the State of Kansas consists of forty members, each elected from a separate senatorial district in the State of Kansas.

III.

On June 2, 1924, the sixty-eighth Congress of the United States proposed the following amendment to the Constitution of the United States:

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age."

"Section 2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

IV.

After, to-wit, on or about the 30th day of January, 1925, the legislature of the State of Kansas, in regular session assembled, adopted the following resolutions:

"RELATING TO REJECTING THE PROPOSED CHILD LABOR AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES."

House Concurrent Resolution No. 5,

In Relation to rejecting the proposed child labor amendment to the constitution of the United States,

WHEREAS, The congress of the United States has proposed an amendment to the constitution of the United States of America, in the following words, to-wit:

JOINT RESOLUTION.

"Proposing an amendment to the constitution of the United States of America in congress assembled (two-thirds of each house concurring therein), that the following article is proposed as an amendment to the constitution of the United States, which when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the constitution:

"Article —.

"Section 1. That congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

"Sec. 2. That power of the several states is unimpaired by this article, except that the operation of the state laws shall be suspended to the extent necessary to give effect to legislation enacted by the congress."

THEREFORE BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF KANSAS, THE SENATE CONCURRING THEREIN:

Section 1. That the said proposed amendment to the constitution of the United States of America be and the same is hereby rejected by the legislature of the state of Kansas.

Sec. 2. That certified copies of this concurrent resolution be forwarded by the governor of this state to the secretary of state at Washington, D. C., to the presiding officer of the United States senate, and to the speaker of the house of representatives of the United States.

Approved January 30, 1925."

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Certified copies of said resolution were thereupon duly forwarded by the governor of the State of Kansas to the Secretary of State at Washington, D. C., to the presiding officer of the United States Senate, and to the Speaker of the House of Representatives of the United States, where they were placed upon file.

V.

Thereafter, to-wit: on January 13, 1937, Senator Hartner introduced the following resolution in Senate of the State of Kansas; to-wit:

"SENATE CONCURRENT RESOLUTION NO. 3.

A CONCURRENT RESOLUTION relating to and ratifying the proposed amendment to the constitution of the United States relating to the limitation of age.

WHEREAS, At the first session of the sixtieth congress it was resolved by the Senate and House of Representatives of the United States of America, in Congress assembled (two-thirds of each house concurring therein), that the following article be proposed as an amendment to the constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the said constitution, viz.:

"JOINT RESOLUTION proposing an amendment to the constitution of the United States;

"RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED (two-thirds of each house concurring therein), That the following article is proposed as an amendment to the constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the constitution:

"ARTICLE. —"

"Section 1. The Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

"Section 2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by Congress."

WHEREAS, Said resolution has been submitted to the various states of the United States for ratification, in accordance with the provisions of the constitution of the United States: Now, Therefore,

BE IT RESOLVED BY THE SENATE OF THE STATE OF KANSAS, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN, That the foregoing and above recited amendment to the constitution of the United States be, and the same is hereby ratified by said legislature of the state of Kansas as a part of, and amendment to, the constitution of the United States.

BE IT FURTHER RESOLVED, That the governor of the state of Kansas forthwith forward to the secretary of state of the United States an authenticated copy of the foregoing resolution."

Thereafter, to-wit: on February 15, 1937, said resolution came up for consideration in the Senate of the State of Kansas, and upon roll call twenty senators voted against the adoption and twenty senators voted in favor of the adoption of said resolution. The members voting in the affirmative were:

Allen	Benson	Calvert	Cron
Grant	Hackney	Hansen	Harris
Hodgson	Jones	Lemon	Logan
McDonald	Miller	Ratner	Richard
Seuser	Todd	Waggener	Warren

The members voting in the negative were:

Barron	Bradney	Carter	Cavaness
Coleman	Dale	Denious	Endres
Herbért	Ireland	Keef	Nuzman
Pihlblad	Schmidt	Skovgard	Tompkins
Tripp	Tyson	Wall	Walters

Thereupon, one of the senators, to-wit: Senator McDonald, asked W. M. Lindsay, who was at that time presiding in the Senate and was Lieutenant-Governor of the State of Kansas, but who was not a member of the Senate, if he desired to vote upon the said resolution. Thereupon, Senator Coleman, one of the plaintiffs herein, rose to a point of order and stated that he objected to the president voting upon the resolution or exercising any prerogative to vote because of a tie, and protesting any declaration as to the result of the vote other than that it had failed to carry by reason of its failure to receive a constitutional majority in accordance with the requirements of the constitution of the United States and the constitution of the State of Kansas. The said Lieutenant-Governor, over the objection of said Senator Coleman and against his protest, did then assume the right to and did vote upon said resolution, casting his vote in favor thereof, and then declared that the resolution had received a constitutional majority.

Plaintiffs aver that said resolution did not then and never has received the vote of a majority of said senators, and by reason of that fact did not carry and was lost.

VI.

Afterwards, to-wit: on the — day of February, 1937, Clarence W. Miller, Secretary of the Senate, defendant herein, erroneously and under a misapprehension of the law, messaged said resolution to the House of Representatives where it was afterward considered, and upon

roll call on February 25, 1937, received a majority of the votes of said House of Representatives, to-wit: sixty-five (65) votes in favor thereof, and said resolution was thereafter messaged back to the Senate with the information above stated.

VII.

Said Clarence W. Miller, Secretary of the Senate, is about to have the said resolution enrolled preparatory for the signature of the Lieutenant-Governor, the said Secretary of the Senate, said Speaker of the House of Representatives, and said Clerk of the House of Representatives, and thereafter to send the same to the Secretary of State for authentication and delivery to the Governor of the State of Kansas for transmissal to the Secretary of State of the United States, as provided by the terms of said resolution. If said enrollment, affixing of signatures, authentication and transmissal should take place and the same be filed by the Secretary of State of the United States, plaintiffs fear that it will then be impossible to rectify the erroneous record to the effect that said resolution had passed the Senate of the State of Kansas, when in fact it had failed to receive a majority of the votes of the members of the Senate; and these plaintiffs will be irreparably damaged because the said resolution which twenty members of the Senate to-wit: one-half thereof, refused to support will have become a part of the fundamental law of the United States in case three-fourths of the legislatures including Kansas shall have ratified the same, and these plaintiffs are without any remedy at law.

VIII.

An actual controversy has arisen between the parties hereto with respect to the action taken by the Senate, it being claimed on one hand that the Lieutenant-Governor was entitled to cast the deciding vote upon said resolution and that the resolution was therefore adopted

by the Senate. On the other hand, it is claimed that the Lieutenant-Governor did not have a right to vote on said resolution; that in casting a vote thereon he usurped an authority which he was not entitled to exercise, and that said resolution failed to be adopted.

On the one hand, it is claimed that the defendant, Clarence W. Miller, as Secretary of the Senate, should endorse on said resolution that it was passed while the plaintiffs claim that he should now and immediately endorse thereon the statement that the resolution was not passed, or words to that effect.

IX.

Unless restrained by this court, the said defendant, Clarence W. Miller, Secretary of the Senate, will not endorse upon said resolution that it was not passed but will cause said bill to be enrolled and said W. M. Lindsay, Lieutenant-Governor of the State of Kansas, and said Clarence W. Miller, Secretary of the Senate, will sign said enrolled bill, and said H. S. Buzick, Jr., Speaker of the House of Representatives, and said W. T. Bishop, Chief Clerk of the House of Representatives of the State of Kansas, will sign said enrolled bill and the said Frank J. Ryan, Secretary of State of the State of Kansas, will authenticate said resolution so enrolled together with the signatures affixed thereto and will deliver the same to the Governor of the State of Kansas, to be forwarded by said Governor to the Secretary of State of the United States.

X.

By reason of the premises, the plaintiffs are entitled to a writ of mandamus against the said defendant, Clarence W. Miller, as Secretary of the Senate, directing him to erase the endorsement heretofore made upon said resolution to the effect that it was adopted by the Senate and to endorse thereon the words "Was not passed" or words to that effect, and directing him to hold said reso-

lition without further action thereon; and a mandatory injunction against him and each and all of the other defendants from causing said resolution to be enrolled, signed, certified, published, delivered to the Governor or transmitted to the Secretary of State of the United States.

Wherefore, plaintiffs pray that a writ of mandamus issue from this court against the said defendant, Clarence W. Miller as Secretary of the Senate, directing him to erase the endorsement heretofore made upon said resolution to the effect that it was adopted by the Senate and to endorse thereon the words, "Was not passed" or words to that effect, and directing him to hold said resolution without further action thereon unless and until the Senate might take further action in respect thereto; that a mandatory injunction issue against him and each and all of the other defendants enjoining them from causing said resolution to be enrolled, signed, certified, published, delivered to the Governor or transmitted to the Secretary of State of the United States, unless and until the Senate might duly and regularly take action thereon; that the court enter a declaratory judgment as provided by statute in such case declaring the law with respect to the right of the legislature of the State of Kansas under the premises to further consider any resolution after having once rejected said amendment, and after the long lapse of time since the said amendment was first proposed by Congress, and more especially to declare the law with respect to the right of the Lieutenant-Governor of the state to cast a vote, even in case of tie on such resolution in the Senate;

That a restraining order be issued to the said defendants and each of them, restraining the said Clarence W. Miller, as Secretary of the Senate, from causing said resolution to be enrolled and from signing said resolution when it is enrolled; restraining the said W. M. Lindsay, as Lieutenant-Governor of the State of Kansas and President of the Senate, from signing said en-

rolled resolution; restraining the defendant, H. S. Buzick, Jr., as Speaker of the House of Representatives, and said W. T. Bishop, as Chief Clerk of the House of Representatives, from signing said enrolled resolution; restraining the said Frank J. Ryan, as Secretary of State, from authenticating said resolution or any copy thereof and delivering the same to the Governor of the State of Kansas; that said defendants and each of them show cause on a day to be fixed by this court why a temporary injunction should not be issued and why such injunction should not be made permanent; and for such other, and further relief as to the court may seem equitable and just; and for the costs of this action.

The above petition was duly verified by Rolla W. Coleman.

Thereafter, and before answer, the plaintiffs with permission of the court filed the following amendment to their petition:

(To be inserted in Application for Mandamus by interlineation at the end of paragraph IX as IXa.)

AMENDMENT.

IXa.

Said joint resolution proposing an amendment to the constitution of the United States was adopted on June 2, 1924. Afterwards, action was taken on the proposed amendment by the legislatures of respective states as shown by Exhibit A hereto attached and made a part of said application. The amendment was rejected originally from June 2, 1924, to March 18, 1927, by both houses of the legislatures of twenty-six (26) states and by the action of one house of the legislature in twelve (12) states. During that period, it was ratified in only five (5) states. By reason of said rejection by said

twenty-six (26) states, said proposed amendment was defeated and definitely rejected by the legislatures of the respective states and thereby lost its vitality.

Said amendment lost its vitality by reason of the fact that it has not been ratified within a reasonable time after its submission to the states by Congress on June 2, 1924. When the 18th amendment was proposed on December 19, 1917, Congress placed a time limit in said proposed amendment, namely, seven (7) years, as the reasonable time within which it should be ratified. In proposing the 20th amendment on March 3, 1932, and in proposing the 21st amendment on February 20, 1933, Congress followed the precedent established in proposing the 18th amendment, and in each instance fixed seven (7) years as the time within which the proposed amendment must be ratified. Said provision was and is a declaration by Congress that seven (7) years is a reasonable time within which a proposed amendment to the constitution of the United States should be ratified, and said limitation is in fact a reasonable time within which a proposed amendment should be ratified; any period longer than that would violate the spirit of the constitution of the United States because it is contemplated that the proposal and ratification should not be treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time, the reasonable implication being that when proposed they are to be considered and disposed of presently; and since the ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication contained in said Article 5 that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which would not be true if such ratification were scattered through a long series of years.

IXb.

Under and by the terms of Article 5 of the constitution of the United States, it is provided that amendments to the constitution of the United States must be ratified by the legislatures of the several states. The lieutenant-governor of Kansas is not a member of the legislature of Kansas and had no right to vote upon the ratification of said proposed amendment. The casting of his vote and the counting thereof constituted a violation of the provisions of the constitution of the United States, and for that reason should not be permitted by this court.

PROPOSED "CHILD LABOR" AMENDMENT

(Released April 20, 1935, by The Department of State)

By joint resolution of Congress of June 2, 1924, the following amendment to the Constitution of the United States (commonly known as the "child labor" amendment) was proposed:

"Article ——"

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Sec. 2. The power of the several States is unimpaired by this article except that the operation of State Laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

The records of the Department of State show action taken on the proposed amendment by the legislatures of the respective States as follows:

State	Action	Date of receipt of notification by the Dept. of State
Alabama	No record of action	
Arizona	Ratification by resolution of Jan. 28, 1925, approved Jan. 29, 1925.	Feb. 4, 1925
Arkansas	Ratification by resolution approved June 28, 1924.	July 2, 1924
California	Ratification by resolution of Jan. 8, 1925.	Mar. 5, 1925
Colorado	Ratification by resolution filed in the Office of the Secretary of State of Colorado on Apr. 28, 1931.	May 2, 1931
Connecticut	Joint resolution of Congress Pro- posing the amendment rejected in the Senate of Connecticut Feb. 3, 1925, and in the House of Rep- resentatives of Connecticut Feb. 11, 1925.	Feb. 18, 1925
Delaware	Resolution proposing ratification of proposed amendment rejected in the House of Representatives of Delaware by 32 votes to none, 3 absent, Jan. 28, 1925.	Feb. 20, 1925
	Resolution proposing ratification of proposed amendment rejected in the Senate of Delaware by 17 votes to none, Feb. 2, 1925.	Feb. 5, 1925
Florida	Rejection by resolution filed in the Office of the Secretary of State of Florida on May 14, 1925.	Mar. 19, 1926
Georgia	Rejection by resolution approved Aug. 6, 1924.	Dec. 15, 1924
Idaho	Resolution proposing ratification of proposed amendment was lost in the House of Representatives of Idaho on Feb. 7, 1925, by a vote of 18 yeas, 38 nays, with 6 absent.	Mar. 24, 1925
	Ratification by resolution of Feb. 7, 1935.	Feb. 18, 1935
Illinois	Ratification by resolution of June 30, 1933.	Aug. 21, 1933

Indiana. In the Senate of Indiana on Feb. 5, 1925, the joint resolution of Congress proposing the amendment was "indefinitely postponed and rejected" by a vote of 32 yeas, 16 nays. In the House of Representatives of Indiana on Mar. 5, 1925, a motion "prevailed" that the joint resolution of Congress proposing the amendment be rejected.

Ratification by resolution of Feb. 8, 1935. Feb. 21, 1935

EXHIBIT A—p. 1

State	Action	Date of receipt of notification by the Dept. of State
Iowa	On Mar. 11, 1925, the House of Representatives of Iowa "indefinitely postponed House Joint Resolution No. 2," which had for its purpose the ratification of the proposed amendment to the Constitution of the United States. Ratification by resolution of Dec. 5, 1933.	Mar. 13, 1925
Kansas	Rejection by resolution of Jan. 27, 1925, approved Jan. 30, 1925.	Feb. 2, 1925
Kentucky	Rejection by resolution approved Mar. 24, 1926.	Nov. 15, 1926
Louisiana	Resolution of ratification of the proposed amendment rejected in the House of Representatives of Louisiana on June 27, 1924 by yeas, 23; nays, 55; absent, 21. No action taken by the Senate of Louisiana.	Feb. 12, 1925
Maine	Rejection by resolve of Apr. 10, 1925.	Sept. 8, 1925
Maine	Ratification by resolve of Dec. 16, 1933, approved Dec. 16, 1933.	Dec. 21, 1933
Maryland	Rejection by resolution approved Mar. 18, 1927.	Mar. 21, 1927

Massachusetts.	Act of the Commonwealth of Massachusetts approved June 5, 1924, placing "upon the ballot to be used at the biennial State election in the current year the following question: Is it desirable that the general court ratify the following proposed amendment to the Constitution of the United States?"	June 11, 1924
	The Senate of Massachusetts on Feb. 16, 1925, rejected the proposed amendment by a vote of 33 yeas to 1 nay.	Mar. 2, 1925
	The House of Representatives of Massachusetts on Feb. 19, 1925, adopted, by a vote of 204 yeas to 9 nays, resolutions rejecting the proposed amendment.	Nov. 10, 1933
Michigan	Ratification by resolution of May 10, 1933.	May 17, 1933
Minnesota	Rejection by resolution of Apr. 14, 1925.	Apr. 17, 1925
Mississippi	Ratification by resolution of Dec. 14, 1933, approved Dec. 14, 1933.	Dec. 18, 1933
Missouri	No record of action.	
Montana	Rejection by resolution of Mar. 20, 1925.	Mar. 26, 1925
Nebraska	Ratification by resolution approved Feb. 11, 1927.	Feb. 15, 1927
Nevada	No record of action.	
New Hampshire	No record of action.	
New Jersey	Rejection by resolution of Mar. 18, 1925.	Mar. 28, 1925
New Mexico	Ratification by resolution of May 17, 1933.	May 23, 1933
New York	Ratification by resolution of June 12, 1933.	June 15, 1933
North Carolina	No record of action.	
North Dakota	No record of action.	
	Rejection by resolution of Aug. 23, 1924.	Nov. 22, 1924
	Certificate dated Jan. 28, 1925, that the Senate of North Dakota, by vote of 32 to 17, resolved not to ratify the proposed amendment to the Constitution.	Jan. 31, 1925

	Ratification by resolution filed in the Office of the Secretary of State of North Dakota on Mar. 4, 1933.	Aug. 17, 1933
Ohio	Ratification by resolution of Mar. 22, 1933.	May 31, 1933
Oklahoma	Ratification by resolution of July 5, 1933.	July 13, 1933
Oregon	Ratification by resolution of Jan. 31, 1933.	July 12, 1933
Pennsylvania	Rejection by resolution of Apr. 16, 1925. Ratification by resolution of Dec. 21, 1933.	May 23, 1925 May 25, 1934

EXHIBIT A—p. 2

State	Action	Date of receipt of notification by the Dept. of State
Rhode Island	No record of action.	
South Carolina	Rejection by resolution of Jan. 27, 1925.	Feb. 21, 1925
South Dakota	Certificate dated Feb. 24, 1925, that the proposed amendment to the Constitution of the United States having been duly proposed by a joint resolution in the Senate and the House of Representatives of South Dakota during its nineteenth legislative session "failed of passage." In the Senate of South Dakota the vote was: Yes, 5; no, 36; absent and not voting, 1; excused, 3. In the House of Representatives of South Dakota the vote was: Yes, 26; no, 73; absent and not voting, 1; excused, 3.	Mar. 2, 1925
	The South Dakota Legislature again rejected the proposed amendment to the Constitution of the United States at its special session which convened July 31, 1933. This was by House Resolution No. 1, the vote being: Yes, 43; no, 48; absent and not voting, 11; excused, 1.	Mar. 17, 1934

Tennessee	Rejection by resolution of Feb. 4, 1925.	Feb. 11, 1925
Texas	Rejection by resolution of Jan. 27, 1925, approved Feb. 2, 1925.	Mar. 2, 1925
Utah	Rejection by resolution of Feb. 4, 1925.	Feb. 12, 1925
	Ratification by resolution of Feb. 5, 1935.	Feb. 11, 1935
Vermont	Rejection by resolution certified Feb. 26, 1925.	Feb. 28, 1925
Virginia	Rejection by resolution of Jan. 22, 1926.	Mar. 3, 1926
Washington	Ratification by resolution of Feb. 3, 1933.	May 24, 1933
West Virginia	Ratification by resolution of Dec. 12, 1933.	Jan. 8, 1934
Wisconsin	Ratification by resolution filed in the Office of the Secretary of State of Wisconsin Feb. 25, 1925.	Feb. 28, 1925
Wyoming	Ratification by resolution of Jan. 31, 1935, approved Feb. 1, 1935.	Mar. 2, 1935

EXHIBIT A—p. 3

An alternative writ was allowed and service was duly had upon the several defendants except the State of Kansas.

Thereafter, upon suggestion of counsel, the court made the following order:

ORDER.

WHEREAS, the Court's attention has been called to the fact that the final adjournment of the Legislature of the State of Kansas has been fixed for March 23, 1937; and

WHEREAS, this case has been set by the Court for April 5, 1937; and

WHEREAS, this Court, by its order heretofore made, has enjoined the officers of the Legislature from com-

pleting their official acts in connection with the certifying of Senate Concurrent Resolution Number Three, involved in this action; and,

WHEREAS, it is the sense of the Court that the rights of all parties shall not be affected by adjournment of the Legislature;

IT IS THEREFORE CONSIDERED AND ORDERED BY THIS COURT, that all of the defendants, except the defendant, Frank J. Ryan, Secretary of State, are ordered and directed to carry out the procedure established by the Legislature for the passage of Concurrent Resolutions in relation to Senate Concurrent Resolution No. Three, being the resolution involved; and provided said resolution already has been enrolled, then that all of said defendants, except Frank J. Ryan, as Secretary of State, who does not sign until after the Governor, shall perform such acts and affix such signatures to the enrolled resolution as is above provided for the original resolution; and that after having performed such acts in accordance with this order, that said original resolution and enrolled resolution be delivered to the Clerk of this Court to be held by said clerk until the further order of this Court.

IT IS FURTHER ORDERED that the order heretofore made in this cause be and remain in full force and effect, except as modified herein.

IT IS FURTHER ORDERED that no prejudice shall result to any party by reason of this order; and that the rights of plaintiffs and defendants shall be and remain the same as at the filing of this action.

Afterwards, and on March 30, 1937, the Senate of the State of Kansas, by a vote of twenty-five to thirteen, passed the following resolution:

SENATE RESOLUTION No. 26.

WHEREAS, Twenty-one members of this Senate have joined as plaintiffs in a suit in the Supreme Court entitled Rolla W. Coleman, et al. versus Clarence W. Miller as Secretary of the Senate of the State of Kansas, et al., being original proceedings in said court numbered 33,459 for the purpose of determining whether or not senate concurrent resolution No. 3 was legally introduced and passed by the senate; and

WHEREAS, The State of Kansas and all of the citizens thereof are interested in a determination of the questions involved in said lawsuit; and

WHEREAS, It further appears that the attorney general has declined to enter the appearance of the State of Kansas, as is required by Section 75-702, G. S. Kansas 1935: Now, therefore,

BE IT RESOLVED, That the attorney general is hereby directed and required to enter the appearance of the State of Kansas and to appear for the State of Kansas in said action and proceedings and to represent the state as its interests may appear therein.

ADOPTED March 30, 1937.

Thereupon, the court made the following order:

ORDER MAKING THE STATE OF KANSAS, ex rel.,
CLARENCE V. BECK, AS ATTORNEY GENERAL
A PARTY DEFENDANT:

Now on this 3rd day of April, 1937, the Application of Clarence V. Beck, as Attorney General of and for the State of Kansas, to be made a party defendant, having been considered and granted, it is ordered that the State of Kansas, ex rel. Clarence V. Beck, as Attorney General, be and it hereby is made a party defendant herein.

Afterward, to-wit, on the — day of ——, 1937,
the lieutenant-governor filed his answer as follows:

ANSWER.

Comes now the defendant, William N. Lindsay, Lieutenant-Governor of the State of Kansas, and president ex officio of the Senate of the State of Kansas, and for his separate answer to the petition filed herein alleges and states:

I.

That the court is without jurisdiction to try this cause for the reason that the issues raised by the petition are political and not judicial.

II.

That the plaintiffs have no legal capacity to maintain this action.

III.

That the answering defendant denies generally and specifically each, every, and all of the allegations and averments in the petition contained, except such allegations as are hereinafter expressly admitted.

IV.

This answering defendant expressly admits the allegation of fact contained in the first and third paragraphs of plaintiffs' petition.

V.

This answering defendant further expressly admits the allegation of fact contained in paragraph four of plaintiffs' petition; that the proposed Child Labor Amendment to the Constitution of the United States was rejected, between June 2, 1924, and March 18, 1937, by

the legislatures of twenty-six states and that during the same period it was ratified by five states.

But plaintiff alleges that the issue attempted to be raised by reason of the facts admitted, in this the fifth paragraph of this answer, are wholly redundant and immaterial and do not raise any issue upon which the court may grant any relief in this cause for the reason that the officers who are made defendants herein have no power or authority to pass on or determine the validity of the resolution passed.

VI.

For a further answer to the petition filed herein, this answering defendant alleges and states that Senate concurrent resolution No. 3 was, on the 13th day of January, 1937, introduced in the Senate of the State of Kansas according to the rules regularly adopted by said body and, in accordance with such rules, said resolution came before the Senate of the State of Kansas on the 15th day of February, 1937, and after full consideration, it came on regularly for the vote of the Senate.

Thereupon, the chair stated the question: "Shall the resolution be adopted?"

Thereupon, the roll of the Senate was called. Twenty senators voted in favor of the adoption of the resolution and twenty senators voted against the adoption of the resolution. Thereupon, the announcement was made that the Senate was equally divided on the adoption of the resolution. Thereupon, Senator McDonald, a member of the Senate, requested the president of the Senate, this answering defendant, to vote on the resolution.

Thereupon, Senator Coleman, a member of the Senate, rose to a point of order and stated: "As a senator in this body I object to the president voting upon this resolution or exercising any alleged prerogative to vote because of a tie. And I further protest any other declaration as to the result of this vote, other than it has

failed to carry by reason of its failure to receive a constitutional majority in accordance with the requirement of the constitution of the United States and the constitution of the State of Kansas, and I desire to be heard on that point of order."

The president of the Senate replying to the objection of Senator Coleman stated: "Under the constitution of Kansas it becomes the duty of the president of the Senate to cast a vote only in the event of a tie. Since it has come to this point, in the opinion of the chair, it is his duty to cast a vote on Senate concurrent resolution No. 3, I want to say that he is casting it after having given the subject considerable study. The president of the Senate votes Aye on Senate concurrent resolution No. 3."

Thereupon, Senator Coleman renewed his objection to which the president of the Senate replied: "It is still the opinion of the chair that the president of the Senate is a part of the Senate, and that the constitution sets out his duties, and it becomes his duty to vote when a vote is tied on questions coming before this Senate."

Thereupon, Senate concurrent resolution No. 3 was declared carried and no appeal was taken from the decision of the president of the Senate.

The officers of the Senate, including the secretary of the Senate, duly certified and sent Senate concurrent resolution No. 3 to the House of Representatives for its consideration, in accordance with the laws of the state and rules of the Senate, and the resolution came on for consideration in the House of Representatives and on the 25th day of February, 1937, said resolution was adopted by the House of Representatives of the State of Kansas, sixty-five members voting in favor of the adoption of the resolution which was more than a majority of the members of said House; and, said resolution as thus adopted became the valid act of the legislature of the State of Kansas.

VII.

This answering defendant further states that Senate Rule No. 48 with reference to the procedure for concurrent resolutions, which was fully complied with in the passage of Senate concurrent resolution No. 3 is as follows:

"Resolutions shall be of the following classes: (1) Senate resolutions, (2) Senate concurrent resolutions, and (3) Senate joint resolutions. In acting on them, the Senate shall observe the following procedure:

1. Senate resolutions shall be in writing, shall be read and shall lie over one day; they shall not be printed unless ordered by the Senate. There shall be no roll call unless ordered.

2. Senate concurrent resolutions shall be in writing, shall be read, and shall lie over one day. All Senate concurrent resolutions shall be printed, and shall require a roll call on motion to adopt. Propositions to amend the constitution shall be submitted by concurrent resolutions, to conform to section 1, article 14, of the constitution: PROVIDED, That all concurrent resolutions amending the constitution shall be referred to the proper committees.

3. Senate joint resolutions shall follow the same procedure as bills, shall be read a first, second and third time, and shall take the regular course of bills on the Calendar, and shall when passed on roll call be signed by the governor.

"All House joint and House concurrent resolutions, when in the Senate, shall follow the same procedure as Senate resolutions of the same class.

"This rule shall not apply to resolutions relating to the business of the day, nor to resolutions for adjournment."

VIII.

This answering defendant further states that Senate resolution No. 59, defining the duties of the secretary of the Senate, is as follows:

"It is the duty of the secretary to call the roll; report correctly the result of all balloting, aye and no and division votes; read the Journal or cause the same to be read; read all bills, resolutions, petitions or other papers which the Senate may require; deliver all messages to the House of Representatives; certify all enrolled bills, and present the same to the president of the Senate for his signature; endorse upon every paper presented in the Senate the successive stages of action had thereon, and see that proper records be made of the transmission of every paper from one house to the other, or from one office to another; certify to the auditor of state the time of service of members and officers of the Senate, and attend generally to such other matters as his office may require. For the purpose of securing uniformity and system, the following clerks and their assistants shall be under the supervision and control of the secretary, to-wit: The docket clerk, the journal clerk, bookkeeper, calendar clerk and bill clerk."

IX.

This answering defendant further states that Senate Rule No. 74 is as follows:

"In all cases where these rules do not apply, the rules of parliamentary law laid down in Robert's Rules of Order shall govern."

And that Robert's Rules of Order, article 4, section 21, among other things provides:

"An appeal may be made from any decision of the chair (except when another appeal is pending),

but it can be made only at the time the ruling is made."

Plaintiffs in this action failed to take any appeal from the decision of the president of the Senate which under the rules of the Senate they had the right to do, and are by reason thereof, estopped from questioning the correctness of the ruling of the president of the Senate.

X.

This answering defendant further states that the lieutenant-governor, by virtue of his office, is a member of the legislature of the State of Kansas, as that term is used in the Constitution of the United States, for the purpose of voting where the Senate is equally divided.

Therefore, this defendant prays that the prayer of plaintiffs' petition be denied.

The defendant, H. S. Busick, Jr., filed his answer as follows:

ANSWER OF THE DEFENDANT H. S. BUZICK, JR., AS SPEAKER OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF KANSAS.

Comes now the defendant, H. S. Buzick, Jr., as Speaker of the House of Representatives of the State of Kansas, and for his answer states that the House of Representatives of the State of Kansas completed its action on Senate Concurrent Resolution number three prior to the filing of this action; that no controversy has arisen concerning the action of the House of Representatives of the State of Kansas with regard to the passage of said Senate Concurrent Resolution number three; and that no order is sought against this answering defendant compelling him to perform or do any act; but only that he be restrained from doing anything further with Senate Concurrent Resolution number three.

Therefore, this answering defendant stands ready to abide the further orders of this Court, and prays that he have and recover his costs.

Similar answers were filed by each of the other defendants, except the State of Kansas, which failed to plead.

To the answer of the lieutenant-governor, plaintiffs filed the following reply:

**REPLY OF PLAINTIFFS TO WILLIAM N. LINDSAY
AS LIEUTENANT-GOVERNOR OF THE STATE
OF KANSAS AND PRESIDENT EX OFFICIO OF
THE SENATE OF THE STATE OF KANSAS.**

Now come the plaintiffs in the above cause and for their reply to the answer of the said William N. Lindsay as Lieutenant-Governor of the State of Kansas and President ex officio of the Senate of the State of Kansas and deny generally and specifically each and every allegation set out in defendants' answer except such as are herein expressly admitted, and state:

I.

That they deny the allegations contained in the defendant Lindsay's answer, as set out in paragraph one thereof, to-wit:

That the issues raised by the plaintiffs' petition are political and not judicial. Plaintiffs assert that the issues raised are judicial because the question at issue is whether or not the resolution in controversy was legally passed.

II.

That the plaintiffs deny the allegation of the defendant that the plaintiffs have no legal capacity to maintain this action, but state that:

First, the plaintiffs have the legal right to maintain this action because they have a special interest in the

performance of their duty and in the votes which they have cast becoming effective and not nullified by the unlawful counting of said votes.

Second, that plaintiffs as members of the State Senate, have a peculiar and inherent right to have their functions as such members of the Senate and as prescribed by the Constitution and the Laws of this State, protected; and that their rights as such legislators be not usurped or contravened.

III.

Further replying to the defendant Lindsey's answer as set out in paragraph 5, plaintiffs deny that the issues raised by the plaintiffs in paragraph 4 of their petition is redundant and immaterial and do not raise any issue wherein the court may grant any relief in this cause but aver that the officer, Clarence W. Miller, as secretary of the Senate of the State of Kansas, does have the power in this particular case to certify or not to certify as to whether or not the said resolution had been passed by the Senate of the State of Kansas, and that said paragraph does raise a clear and distinct issue as to whether or not his certification was correct and as to whether or not this court should determine the correctness or incorrectness of such certification and whether or not an order should be made, requiring a correct certification to be made,

IV.

Plaintiffs further replying admit that the procedure as set out in paragraph 6 of defendants' answer is substantially correct except that they deny that the officers of the Senate, including the secretary of the Senate, duly certified and sent Senate Concurrent Resolution No. 3 to the House of Representatives for its consideration in accordance with the laws of the State of Kansas and deny that said resolution as adopted by the House be-

came the valid act of the Legislature of the State of Kansas.

V.

Plaintiffs further replying to the defendants' answer, admit the substantial correctness of the rules of the Senate as set out in defendants' answer in paragraph 7.

VI.

Plaintiffs further replying to the defendants' answer, admit that the statement as to the duties of the secretary of the Senate, as set out in defendants' answer in paragraph 8 is substantially correct.

VII.

Plaintiffs further replying to the answer of the defendant Lindsay, state that the Senate rules as set out in paragraph 9, are substantially correct but plaintiffs deny that the failure upon the part of the plaintiffs to take any appeal from the decision of the president of the Senate did in any way estop the plaintiffs from questioning the correctness of the ruling of the president of the Senate. Plaintiffs state that they are not estopped because of such failure for the reason that the question of the right of the Lieutenant-Governor to vote in this instance is not a parliamentary question over which the Senate had control, and because an appeal, though successful, would have been in vain. That the Senate might have control over the interpretation of its own rules but that the action of the presiding officer in this instance was based upon an alleged constitutional right and not upon any right imposed by the Senate rules or Robert's Rules of Order.

VIII.

Plaintiffs further answering deny the statement of the defendant as set out in his answer in paragraph 10, that as Lieutenant-Governor and by virtue of his office

he is a member of the Legislature of the State of Kansas and deny that the Lieutenant-Governor, the defendant, had any right to vote on the Concurrent Resolution No. 3, the subject of this suit; but on the contrary, is specifically eliminated by the constitution of the State of Kansas from having the right or power to vote on the question of the passage of a bill, a joint resolution or a concurrent resolution affecting the ratification of a proposed amendment of the Constitution of the United States.

WHEREFORE, the plaintiffs fully replying to the answers of all the defendants in the above cause, do renew their prayer for a judgment as prayed for in their petition.

Formal replies were filed by plaintiffs to the respective answers of the Secretary of State, the Speaker of the House, and the Chief Clerk of the House.

The foregoing is a true and correct abstract of the record in the above entitled case.

ROLLA W. COLEMAN,
Olathe, Kansas,

ROBERT STONE,
JAMES A. McCLURE,
ROBERT L. WEBB,
BERYL R. JOHNSON,
RALPH W. OMAN,
Topeka, Kansas,

Attorneys for Plaintiff.

The cost of printing this abstract amounts to \$ 24.75

[fol. 34] Be it Further Remembered, that afterward and on the 11th day of June, 1937, the same being one of the regular judicial days of the January, 1937, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka, the following proceedings among others was had and remain of record in the words and figures as follows, to-wit:

[fol. 35] IN THE SUPREME COURT OF THE STATE OF KANSAS

Topeka, Friday, June 11, 1937.

No. 33,459

ROLLA W. COLEMAN et al., Plaintiffs,

vs.

CLARENCE W. MILLER et al., Defendants

This cause comes on for hearing upon the pleadings filed herein and thereupon after oral argument by Rolla W. Coleman and Robert Stone for the plaintiffs; and E. R. Sloan, Payne Ratner and C. V. Beck, Attorney General for the defendants said cause is submitted upon brief of both parties and taken under advisement by the court.

[fol. 36] Be it Further Remembered, that afterward and on the 16th day of September, 1937, the same being one of the regular judicial days of the July, 1937, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka, the following proceedings among others was had and remain of record, in the words and figures as follows, to-wit:

[fol. 37] IN THE SUPREME COURT OF THE STATE OF KANSAS

Topeka, Thursday, September 16, 1937.

No. 33,459

ROLLA W. COLEMAN et al., Plaintiffs,

vs.

CLARENCE W. MILLER et al., Defendants

This cause comes on for decision and thereupon after due consideration by the court it is ordered and adjudged

that the peremptory writ of mandamus prayed for herein be denied.

It is further ordered that the plaintiff pay the costs of this proceeding taxed at \$— and hereof let execution issue.

Allen, J. delivered the opinion of the court. Hutchison, J. dissenting. Dawson, C. J.; Harvey, J.; Smith, J.; Thiele, J.; Wedell, J. and Allen, J. concurring. Smith, J. concurring specially.

[fol. 38] Be it Further Remembered, that on the 16th day of September, 1937, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the Opinion of the Court with the Syllabus attached, a copy of which Opinion and Syllabus is in the words and figures, as follows, to-wit:

No. 33,459

SUPREME COURT STATE OF KANSAS

JULY TERM, 1937

PRESENT:

HON. JOHN S. DAWSON, CHIEF JUSTICE

HON. W. W. HARVEY,

HON. WM. EASTON HUTCHISON,

HON. WILLIAM A. SMITH,

HON. WALTER G. THIELE,

HON. HUGO T. WEDELL,

HON. HARRY K. ALLEN,

JUSTICES.

Coleman v. Miller

Opinion Filed September 16, 1937

Coleman v. Miller

No. 33,459

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C. BRAUN, J. B. CARTER, WILFRID CAVANESS, KIRKE W. DALE, JESSE C. DENIOUS, BENJAMIN F. ENDRES, EWING HERBERT, W. E. IRELAND, WALTER F. JONES, WALTER E. KEENE, FRED R. NUZMAN, ERNST F. PIHLBLAD, C. W. SCHMIDT, THALE P. SKOVGAARD, HARRY M. TOMPKINS, RAY C. TRIPP, ROBERT J. TYSON, N. B. WALL, RAIMON C. WALTERS, GEORGE W. PLUMMER, FRANK C. POMEROY and A. W. RELIHAN, *Plaintiffs*, v. CLARENCE W. MILLER, as Secretary of the Senate, WILLIAM M. LINDSAY, as Lieutenant Governor and President ex officio of the Senate, H. S. BUZICK, JR., as Speaker of the House of Representatives, W. T. BISHOP, as Chief Clerk of the House of Representatives, and FRANK J. RYAN, as Secretary of State; and the STATE OF KANSAS, *Defendants*.

SYLLABUS BY THE COURT

1. STATUTES—*Enactment of Bills and Resolutions—Lieutenant Governor's Right to Vote.* Upon the passage of a bill or joint resolution, where the senate is equally divided, the lieutenant governor, under section 12 of article 1, and section 13 of article 2 of the constitution, is not entitled to vote.
2. SAME—*Concurrent Resolution—Nature and Effect.* Where upon the passage of a senate concurrent resolution ratifying the proposed child-labor amendment to the constitution of the United States, the senate was equally divided, it is held that as such measure was not an act of legislation having the force of law, but a mere expression of assent of the legislature to the proposed amendment, under the above sections of the constitution of Kansas, the lieutenant governor was entitled to cast the deciding vote on such concurrent resolution.
3. CONSTITUTIONAL LAW—*Amendments—Ratification by States—Validity.* Where the legislature has rejected an amendment to the constitution of the United States proposed by congress, it may later reconsider its action, and give its approval to such proposed amendment.
4. SAME—*Amendments—Time for Ratification.* The child-labor amendment to the constitution of the United States, proposed by congress by resolution adopted by that body on June 2, 1924, retained its vitality as a proposed amendment, and the action of the state senate on February 15, 1937, in adopting the senate concurrent resolution ratifying such proposed amendment was valid and binding.

Original proceeding in mandamus. Opinion filed September 16, 1937. Writ denied.

Rolla W. Coleman, of Olathe, Robert Stone, James A. McClure, Robert L. Webb, Beryl R. Johnson and Ralph W. Oman, all of Topeka, for plaintiffs

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E. R. Sloan, of Topeka, for William M. Lindsay; Lieutenant governor.

C. V. Beck, attorney general, and *Payne H. Ratner*, of Parsons, for Frank J. Ryan, secretary of state.

Harry Fisher, *J. S. Parker*, *C. V. Beck*, all of Topeka, for H. S. Buzick, speaker of the house, and *W. T. Bishop*, chief clerk.

The opinion of the court was delivered by

ALLEN, J.: This is an original proceeding in mandamus brought by twenty-one members of the state senate and three members of the house of representatives to compel Clarence W. Miller, secretary of the state senate, to erase an endorsement on senate concurrent resolution No. 3 (generally known as the child-labor amendment resolution) to the effect that the same was adopted by the senate, and to compel him to endorse thereon the words "was not passed."

There is no dispute as to the facts. On June 2, 1924, the sixtieth congress of the United States proposed the following amendment to the constitution of the United States:

"SECTION 1. The congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"SECTION 2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the congress."

On January 13, 1937, a resolution known as "senate concurrent resolution No. 3" was introduced into the state senate. This resolution, after the preamble setting forth the joint resolution of congress in proposing an amendment to the constitution of the United States, commonly known as the child-labor amendment, provided:

"Be it resolved by the senate of the state of Kansas, the house of representatives concurring therein, That the foregoing and above-cited amendment to the constitution of the United States be, and the same is hereby ratified by said legislature of the state of Kansas as a part of, and amendment to, the constitution of the United States."

On February 15, 1937, this resolution came up for consideration in the senate, and upon roll call, twenty senators voted against the adoption and twenty senators voted in favor of the adoption of the resolution. Thereupon W. M. Lindsay, the lieutenant governor of the state, the presiding officer, over the protest of one of the senators, cast his vote in favor of the adoption of the resolution.

As stated, this proceeding in mandamus was brought to compel the secretary of the senate to erase the endorsement on the resolution

that the same was passed, and to make an endorsement thereon that it had not passed.

An alternative writ was allowed and answers filed by all the defendants except the state of Kansas.

At the threshold we are confronted with the question raised by the defendants as to the right of the plaintiffs to maintain this action. It appears that on March 30, 1937, the state senate adopted a resolution directing the attorney general to appear for the state of Kansas in this action. It further appears that on April 3, 1937, on application of the attorney general, an order was entered making the state of Kansas a party defendant. The state being a party to the proceedings, we think the right of the parties to maintain the action is beyond question. (G. S. 1935, 75-702; *State, ex rel., v. Public Service Comm.*, 135 Kan. 491, 11 P. 2d 999.)

Plaintiffs contend: First, The amendment was not ratified by the senate because the lieutenant governor was not a member of the senate and had no right to vote; that the resolution did not receive a vote of a majority of the members of the senate and was lost; second, when the legislature, on January 30, 1925, adopted a resolution to reject the amendment and filed notification thereof with the secretary of state, it exhausted its power with reference to the proposed amendment.

Did the lieutenant governor have the right to cast the deciding vote on senate concurrent resolution No. 3 when the senate was equally divided? In the solution of this question we first look to the constitution of the United States.

Article 5 of the constitution of the United States provides:

"The congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided, That no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate."

It is settled beyond controversy that the function of a state legislature in ratifying a proposed amendment to the constitution of the United States, like the function of congress in proposing an amendment, is a federal function derived from the federal constitution;

and it transcends any limitation sought to be imposed by the people of a state. The power to legislate in the enactment of the laws of a state is derived from the people of the state, but the power to ratify a proposed amendment to the federal constitution has its source in that instrument. The act of ratification by the state derives its authority from the federal constitution, to which the state and its people alike have assented.

(*Leser v. Garnett*, 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505; *Hawke v. Smith*, 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 871, 10 A. L. R. 1504; *Rhode Island v. Palmer*, 253 U. S. 350, 40 S. Ct. 486, 64 L. Ed. 946.)

If the legislature, in ratifying a proposed amendment, is performing a federal function, it would seem to follow that ratification is not an act of legislation, in the proper sense of that term. It has been so held. In *Hawke v. Smith*, supra, it was said: "Ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment." (p. 229.)

The function of the legislature being merely to register the assent or approbation of the state to such proposed amendment, in what manner must such assent be manifested? As the legislature of Kansas is a parliamentary body, we must look to the law by which proceedings in that body are governed.

Under section 2 of article 2 of the constitution of Kansas, and G. S. 1935, 4-101, the senate shall consist of forty members, and the house of representatives of one hundred and twenty-five members. (*State, ex rel., v. Francis, Treas.*, 26 Kan. 724.) As it is conceded that senate concurrent resolution No. 3 duly passed the house, our attention must be directed to the action in the senate.

Under the constitution of Kansas (sec. 1, art. 1) the lieutenant governor is a member of the executive department of the state.

Parliamentary action in the senate is governed by two provisions of the constitution. These provisions are:

"The lieutenant governor shall be president of the senate, and shall vote only when the senate is equally divided . . ." (Sec. 12, Art. 1.)

"A majority of all the members elected to each house, voting in the affirmative, shall be necessary to pass any bill or joint resolution." (Sec. 13, Art. 2.)

It is argued on behalf of the plaintiffs that senate concurrent resolution No. 3 did not receive a vote of a majority of the members of the senate, that the lieutenant governor is not a member of the sen-

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ate, hence the resolution did not pass. This view finds a conflict in the two sections, and by placing emphasis on section 13, article 2, virtually expunges section 12 of article 1 from the constitution.

On the other hand, defendants contend that the lieutenant governor is entitled to vote as a member of the senate on the final passage of bills and joint resolutions. As he was not elected as a member of the senate, this theory writes with invisible ink an amendment to section 13 of article 2, and ignores section 1 of article 1, which specifies that the lieutenant governor is a member of the executive department of the state.

It is evident, therefore, that both plaintiffs and defendants in this controversy find an irreconcilable conflict in the two provisions of the state constitution.

In I Cooley's Constitutional Limitations, 8th Ed., p. 128, the rule of construction is stated as follows:

"The rule applicable here is that *effect is to be given, if possible, to the whole instrument*, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.

"This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction, would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together. Every provision should be construed, where possible, to give effect to every other provision."

Applying these rules of construction, we think the two provisions of the constitution may be harmonized, hence it is not necessary to make a choice between undesirable alternatives. We think the lieutenant governor had a right to vote on the concurrent resolution, for the simple reason that *the vote was not on a bill or joint resolution*, that is, it was not on an act of legislation having the force of law. The vote was merely on a measure expressing assent to the proposed amendment.

Under section 12 of article 1, the lieutenant governor "shall vote only when the senate is equally divided." He may vote, then, in some cases. When? Obviously in all cases of equal division of the

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senate, except when his right to vote is expressly denied. By section 13 of article 2, a majority of all members elected to the senate, voting in the affirmative, is necessary to pass any bill or joint resolution. The lieutenant governor was not elected to the senate. The constitution gives him the right to vote when the senate is equally divided, but denies this right in two cases—when the equal division is on a bill or a joint resolution.

The fundamental fallacy in the argument presented on behalf of plaintiffs is in the unwarranted assumption that because the lieutenant governor cannot vote on a bill or joint resolution, he is denied the right to vote in all cases. In effect, plaintiffs insist that the legislature in acting on the resolution for ratification of the proposed amendment to the federal constitution was engaged in an act of legislation having the force of law.

Article 5 of the constitution of the United States provides that congress, when two thirds of both houses deem it necessary, shall propose amendments to the constitution which, when ratified by the legislatures of three fourths of the states, shall become a part of the constitution. It is not necessary that such proposed amendment be approved by the president, nor that the act of ratification be approved by the governor of a state. Ratification is not an act of legislation; it is merely an expression of the assent of the state to the proposed amendment.

As stated above, the real question for our determination is how that assent may be manifested by the legislature. The vehicle used by the legislature was a concurrent resolution. While concurrent resolutions are not mentioned in the constitution, the constitution does use the expression "bill or joint resolution." In legislative practice a distinction is made between "joint resolutions" and "concurrent resolutions." Senate rule No. 48 reads as follows:

"Resolutions shall be of the following classes: (1) senate resolutions, (2) senate concurrent resolutions, and (3) senate joint resolutions. In acting on them, the senate shall observe the following procedure:

"1. Senate resolutions shall be in writing, shall be read and shall lie over one day; they shall not be printed unless ordered by the senate. There shall be no roll call unless ordered.

"2. Senate concurrent resolutions shall be in writing, shall be read, and shall lie over one day. All senate concurrent resolutions shall be printed, and shall require a roll call on motion to adopt. Propositions to amend the constitution shall be submitted by concurrent resolutions, to conform to section 1, article 14, of the constitution: *Provided*, That all concurrent resolutions amending the constitution shall be referred to the proper committee.

"3. Senate joint resolutions shall follow the same procedure as bills, shall be read a first, second and third time, and shall take the regular course of bills on the calendar, and shall when passed on roll call be signed by the governor."

In *Legislative Procedure in Kansas*, by Guild and Snider, pp. 77-80, it is said:

"Concurrent resolutions are used to express the will or sentiment of both houses of the legislature, and therefore must be acted upon by both houses. There has been considerable confusion in Kansas and in many other states concerning the distinction between concurrent and joint resolutions, and in Kansas the practice is far from standardized. A study of precedents, however, shows that concurrent resolutions are always used in two classes of cases. The first general group concerns the mere expression of an opinion or sentiment by the legislature. Resolutions memorializing congress, relating to the death of a public man, or expressing an opinion on any subject in contrast to passing a law thereon are regularly in the form of concurrent resolutions. In the second group, definite action is taken, binding, however, solely upon the legislature itself and its officers, and not affecting directly the rights of any persons not members of the legislature. Illustrations of such action are: Providing for a joint meeting of the two houses; the appointment of joint committees; agreeing upon final adjournment or setting a date for the introduction or consideration of bills; creating a commission of legislators to investigate public offices. In both of the above groups the general practice in Kansas appears to be to act by concurrent resolutions."

"A joint resolution pertains to business between the two branches of the legislature and must be acted upon by both houses. A joint resolution has the same binding effect as a law. It is, however, used to accomplish a temporary purpose, and its force is at an end when that purpose has been accomplished. Hence it is now the form prescribed by the rules for appropriations."

"Joint resolutions take the same course as bills, requiring three readings, roll call upon final passage, passage by a constitutional majority of both houses, enrollment and signature by the governor."

The constitution (section 20, article 2) provides that no law shall be enacted except by bill. The structural part of a bill consists of the title, the enacting clause and the body or subject matter. Bills and joint resolutions must be signed by the governor. (Const., sec. 14, art. 2.) No bill shall contain more than one subject, which shall be clearly expressed in the title. (Const., sec. 16, art. 2.) The constitution provides for the form of the enacting clause of all laws (sec. 20, art. 2), and that no law of a general nature shall be in force until the same shall be published. (Sec. 19, art. 2.)

Thus both by the constitution and by legislative practice, bills

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and joint resolutions when duly passed and signed by the governor become legislative enactments, with the force of law. If the senate, on the passage of a bill or joint resolution, should be equally divided, the lieutenant governor, under section 13 of article 2, cannot cast the deciding vote. But it is equally clear that if a proposition other than a bill or joint resolution is before the senate, and on the passage of such measure the senate should be equally divided, then, under section 12 of article 1 of the constitution, the lieutenant governor may cast the deciding vote. Otherwise, section 12 of article 1 would be as futile as a painted ship on a painted sea.

In so holding we are far from intimating that the title of a resolution, whether "joint" or "concurrent," governs its nature. That must be determined by the purpose and object of the resolution. If the measure has the characteristics of a law, if it appears to have been passed by the law-making power within the scope of its authority as such, and to furnish a general rule of action binding upon individuals, it may be classed as an act of legislation. (Jameson on Constitutional Conventions, 4th ed., sec. 547.) Two cases will illustrate this proposition.

In *State, ex rel., v. Knapp*, 102 Kan. 701, 171 Pac. 639, a resolution entitled "house concurrent resolution" was held to be a bill—that as it had all the characteristics of a legislative act it was a bill within the meaning of the constitution. In that case the court said:

"The inference seems clear that a joint resolution which is approved by the governor after its adoption by the legislature thereby becomes a law, although this is not declared in so many words. If a law can be enacted only by a bill, and a joint resolution may become a law, it should seem that a joint resolution must be a bill, or may in some instances be regarded as a bill."

"Whether or not legislation may ordinarily be accomplished by means of adoption of a proposition submitted in the form of a resolution, we conclude that the process used in the case now under consideration amounted to the enactment of a law by bill. While the instrument acted upon by the two houses and the governor described itself as a concurrent resolution, it had every characteristic, in form and treatment, of such a bill as by the combined action of the legislature and the governor becomes a law. It had a title which clearly expressed its subject to be the appropriation of money to pay for the Lincoln statue. It was read on three separate days in each house. It contained a provision declaring that 'this act' should take effect upon its publication. In each house it received the votes of a majority of the members elected, and the result of the roll call was entered in full on the journal. It

was submitted to and approved by the governor, and published in the official state paper and in the statute book. 'Joint resolutions,' which may sometimes become laws, are required by the constitution to be adopted by a majority of the membership in each house (art. 2, § 13); by a recorded vote (art. 2, § 10), as well as to be approved by the governor, and 'acts' of the legislature must take effect at a prescribed time, and be published (art. 2, § 19); but, save for these requirements, no mere resolution needs to have a title, to be read on three separate days, to show when it takes effect, to be adopted by a yea-and-nay vote entered on the journal, to be approved by the governor, or to be published. The treatment given this measure seems to show that it was regarded by the legislature and the governor as a 'bill.' It ought to be given effect as such, unless some insuperable obstacle is interposed. The fact that it is styled a concurrent resolution, rather than a joint resolution or bill, is not in itself especially important. It should be classified by its essential qualities rather than by what it happens to have been called." (p. 704.)

But this construction did not meet the unanimous approval of the court; three members of the court dissented. In the dissenting opinion of Justice Dawson it was said:

"A house concurrent resolution is not a law. The constitution takes no cognizance of such a resolution and does not define it. A resolution is a declaration of opinion, or the expression of a purpose—nothing more. In the Session Laws of 1917 are concurrent resolutions expressing the compliments of the house and senate to Hon. Charles F. Scott (ch. 339); expressing condolences on the death of Frank Edimer McFarland (ch. 345); requesting the Kansas senators and representatives in congress to vote for woman suffrage (ch. 351), etc. There are twenty-eight pages of concurrent resolutions in the Session Laws of 1913, the subject matter ranging all the way from memorials to the president, on the high cost of living (ch. 341), to denunciations of 'log rolling' and 'pork barrel' raids on the national treasury (ch. 340). And the decision in this case raises all that sort of stuff to the dignity of legislation." (p. 708.)

A similar question arose in the case of *Kelley v. Secretary of State*, 149 Mich. 343; 112 N. W. 978. The Michigan constitution provided:

"No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house."

"The lieutenant governor shall, by virtue of his office, be president of the senate. In committee of the whole he may debate all questions; and when there is an equal division he shall give the casting vote." (p. 346.)

Upon the passage of a resolution entitled "concurrent resolution" in the senate, consisting of thirty-two members, was equally divided. Thereupon the lieutenant governor voted for the resolution and declared it adopted. The court held the title "concurrent resolution" was unimportant—that its nature and purpose showed that it was

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intended as a legislative act, and therefore the lieutenant governor could not vote thereon. The court said:

"But the resolution, if effective, is none the less a law. It is a law for the procurement of such information. If effective, it imposes legal duties upon the secretary of state (and, if it did not, relator is not entitled to relief), upon the clerks, sheriffs, and boards of election commissioners of the several counties of the state, and upon all the canvassing boards in the state. It undertakes—and, if effective, it succeeds in that undertaking—to provide a legal election not otherwise provided for, and to surround the same with all the safeguards of law." (p. 346.)

"It is also open to the construction—and this is the construction placed upon it by the attorney general—that the right of the lieutenant governor to give a casting vote is limited to the proceedings in the committee of the whole. *And it is, perhaps, open to the construction that he also has the right to give the casting vote upon the passage of resolutions which do not have the force of law, if, as relator contends, there are such resolutions.*" (p. 347.) (Italics inserted.)

"Whether his right to give such casting vote is limited to proceedings in committee of the whole, or extends to resolutions, if there be such, which do not have the force of law, is a question which is not before us and which we do not determine." (p. 348.) (Italics inserted.)

But since there is no valid ground for the contention that senate concurrent resolution No. 3, now before us, was intended as an act of legislation with the force of law, neither the Kansas case of *State, ex rel., v. Knapp*, nor the Michigan case of *Kelley v. Secretary of State*, noted above, has any bearing on the question in this controversy. The distinction is not between a joint resolution and a concurrent resolution; the line is drawn between a measure that has the force of law, and a motion or resolution that is not an act of legislation.

Under article 5 of the constitution of the United States the legislature of Kansas had a right to express its assent to the proposed child-labor amendment. The method adopted was senate concurrent resolution No. 3. This was in no sense an act of legislation in the proper sense of that term; it was the mode in which the legislative assent or approbation was manifested. The senate being equally divided, the lieutenant governor was authorized to cast the deciding vote.

The next question to be considered arises out of the action of the legislature on the 30th day of January, 1925, in rejecting the proposed amendment. On that date the legislature adopted a resolution entitled "house concurrent resolution No. 5," which provided:

"That the said proposed amendment to the constitution of the United States of America be and the same is hereby rejected by the legislature of the state of Kansas."

Certified copies of this resolution were duly forwarded to the Secretary of State at Washington, D. C., and to the presiding officer of each house of congress.

Plaintiffs contend that when Kansas adopted this resolution rejecting the proposed child-labor amendment, it completed its action and exhausted its power with reference to the proposed amendment, and pray that this court enter a declaratory judgment declaring the law with respect to the right of the legislature of the state of Kansas to further consider any resolution, having once rejected said amendment.

It is generally agreed by lawyers, statesmen and publicists who have debated this question that a state legislature which has rejected an amendment proposed by congress may later reconsider its action and give its approval, and that a ratification once given cannot be withdrawn.

In Jameson on Constitutional Conventions, 4th edition, sections 576 and 577, a history of the adoption of the 13th and 14th amendments to the federal constitution is given:

"A question of much interest has several times arisen, whether, when a state legislature has once passed upon an amendment to the federal constitution proposed by congress, its action can afterwards be reconsidered by it, or by its successor, and reversed. It may be useful to consider this question in the two cases, 1, where the action of the legislature was negative, rejecting, and 2, where it was affirmative, ratifying, an amendment.

"1. The question in its negative form first arose, in 1865, in New Jersey, in relation to the thirteenth amendment.

"The amendment was rejected by the legislature of that state December 1, 1865, and notice thereof was duly given to the Secretary of State at Washington. That officer published his certificate December 18, 1865, declaring that the amendment had been adopted by the votes of twenty-seven states, and had become a part of the constitution. In this certificate no mention was made of New Jersey. January 23, 1866, the legislature of New Jersey reversed its previous action, and approved the amendment. The same question arose again in North Carolina, South Carolina, and Georgia, in relation to the fourteenth amendment, submitted by congress to the states on the 16th of June, 1866. The legislatures of those states, together with those of five others, Texas, Virginia, Kentucky, Delaware, and Maryland, rejected the amendment. Afterwards, the governments of ten of the rebel states, including the three first named, were, by the act of congress of March 2, 1867, and the acts supplementary thereto, declared to be illegal, and new governments were erected therein under the direction of congress. By the new legislatures of North Carolina and South Carolina, the former on the 4th and the latter on the 9th of July, 1868, resolutions were passed ratifying the fourteenth amendment. These resolutions were certified to the Secretary of State, and the votes of

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those states were, in pursuance of a resolution of congress, counted by that officer as valid votes, and the amendment was on the 20th of July, 1868, in a certificate of that date, proclaimed by him to have been duly ratified. The new legislature of Georgia, in like manner, on the 21st of July, 1868, receded from its vote rejecting the amendment, and passed a resolution ratifying it, and that state was included by the Secretary of State amongst the ratifying states in a second certificate, issued July 28, 1868.

"Were the legislatures in receding thus, and ratifying after having once rejected the amendment, acting within the scope of their powers? The subsequent recognition of the votes by congress, and by the Secretary of State, as valid, must, we think, settle this question in the affirmative."

It would seem, then, that a state legislature which has rejected an amendment proposed by congress may later reconsider its action and give its approval. (Willoughby on the Constitution, sec. 329a.)

In a release from the department of state under date of April 20, 1935, attached as an exhibit to plaintiff's petition in this case, giving the status of the child-labor amendment, it appears that in five states, Indiana, Minnesota, New Hampshire, Pennsylvania and Utah, after the proposed amendment had been rejected, each of the states later adopted a resolution of ratification. When these states rejected the amendment, was their power with reference to the proposed amendment exhausted? If so, the subsequent ratification would be void. Is it to be seriously argued that the Secretary of State could not count these five states in making up the total number of states necessary to adopt the amendment?

Thus it appears to be an historical fact that many states have rejected proposed amendments, and have later ratified them.

Aside from the historical facts, and the practical construction by the states as to the right to ratify after a former rejection, Judge Jameson argues that upon principle the right is unquestionable. We quote from sections 579, 581 and 583 of his work on Constitutional Conventions:

"But, whether this decision is authority upon the question now considered or not, the right of a state legislature, after a negative vote has once been passed, to recede from it and ratify an amendment, is, we think, upon principle, unquestionable. The language of the constitution is, that amendments proposed by congress, in the mode prescribed, 'shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three fourths of the several states,' etc. By this language is conferred upon the states, by the national constitution, a special power; it is not a power belonging to them originally by virtue of rights reserved or otherwise. When exercised, as contemplated by the constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be nullity. But, until so

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exercised, the power undoubtedly, for a reasonable time at least, remains." (§ 579.)

"To the conclusion that rejection forms no barrier in the way of afterwards ratifying an amendment it may be objected that it recognizes power in the states to ratify, but no power to reject a proposed amendment. This objection is specious, but it has no real foundation. To say that a state has no power to reject would be untrue; for it is an historical fact that, in point of form, many states have rejected amendments, and it would be puerile to contend that a right to pass upon a proposition does not involve a right either to reject or to ratify it. The real question here is what, under the constitution, is the consequence of rejection? Does it, or does it not, as to the rejecting state, definitely settle the fate of the amendment? What we insist upon is, that a state has a right at some time to ratify an amendment submitted to it. That is precisely what is asked of it by congress, and it is that which the constitution empowers it to do. The authority charged with inspecting such votes, therefore, cannot refuse to receive one, certainly if offered within a reasonable time; until after a ratifying vote shall have been received. This view of the question was well presented by Governor Bramlette, of Kentucky, to whom the resolutions above mentioned rejecting the thirteenth amendment had been communicated for his approval, in a message to the legislature of that state. Declining to return the same with his dissent, on the ground that the action of the legislature was complete without his approval, but yet expressing his dissatisfaction with them, and his regret that the amendment had not been ratified, he undertook, as requested, in the second resolution, to forward them to the President and to the presiding officers of the two houses of congress. In the course of his message he said:

"Rejection by the present legislative assembly only remits the question to the people and the succeeding legislature. Rejection no more precludes future ratification than refusal to adopt any other measure would preclude the action of your successors. When ratified by the legislatures of three fourths of the several states, the question will be finally withdrawn, and not before. Until ratified it will remain an open question for the ratification of the legislatures of the several states. When ratified by the legislature of a state, it will be final as to such state; and, when ratified by the legislatures of three fourths of the several states, will be final as to all. Nothing but ratification forecloses the right of action. When ratified all power is expended. Until ratified the right to ratify remains." (§ 581.)

It is also true that a state having once ratified an amendment, a subsequent rejection is void. On this point Jameson says:

"Waiving the consideration of principles, however, the question may be regarded as settled by authority, if a resolution of congress upon it is to be taken as decisive. We have seen that when the votes upon the fourteenth amendment were canvassed by the Secretary of State, doubts were entertained by him whether those of New Jersey and Ohio, whose legislatures had first adopted, and then attempted to reject, that amendment, were to be counted as having adopted it. This doubt was settled by congress, which

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declared by resolution that they were to be counted among the ratifying states, which was accordingly done." (§ 584.)

From the foregoing and from historical precedents, it is also true that where a state has once ratified an amendment it has no power thereafter to withdraw such ratification. To hold otherwise would make article 5 of the federal constitution read that the amendment should be valid "when ratified by three fourths of the states, each adhering to its vote until three fourths of all the legislatures shall have voted to ratify."

It is clear, then, both on principle and authority, that a proposed amendment once rejected by the legislature of a state may by later action of the same legislature be ratified; and that when a proposed amendment has once been ratified the power to act on the proposed amendment ceases to exist.

We hold that the legislature of Kansas had power to act on senate concurrent resolution No. 3, and that the resolution having duly passed the house of representatives and the senate, the act of ratification of the proposed amendment by the legislature of Kansas was final and complete.

Finally it is urged that the proposed amendment has lost its potency by old age. This question was considered by Judge Jameson in his work on the constitution, and we quote from sections 585 and 586:

"The same consideration will, perhaps, furnish the answer to the second question. The constitution gives to congress the power to submit amendments to the states; that is, either to the state legislatures or to conventions called by the states for this purpose, but there it stops. No power is given to prescribe conditions as to the time within which the amendments are to be ratified, and hence to do so would be to transcend the power given. The practice of congress in such cases has always conformed to the implied limitations of the constitution. It has contented itself with proposing amendments, to become valid as parts of the constitution, according to the terms of that instrument. It is, therefore, possible, though hardly probable, that an amendment, once proposed, is always open to adoption by the nonacting or nonratifying states.

The better opinion would seem to be that an alteration of the constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by congress. (§ 585.)

We discuss this question here merely to emphasize the dangers involved in the constitution as it stands, and to show the necessity of legislation to make certain those points upon which doubts may arise in the enjoyment

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of the constitutional process for amending the fundamental law of the nation. A constitutional statute of limitation, prescribing the time within which proposed amendments shall be adopted or be treated as waived, ought by all means to be passed." (§ 586.)

In submitting the proposal for the eighteenth amendment, congress interpolated a limitation that it should be inoperative unless ratified "within seven years from the date of the submission hereof." A similar provision as to the time of ratification was contained in the submission of the twentieth and twenty-first amendments.

The power of congress to fix such a limitation was challenged in *Dillon v. Gloss*, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994. The court held that congress had power to fix the limitation within some reasonable time and that seven years was a reasonable time. This was the decision in the case. The court, *obiter*, said:

"These considerations and the general purport and spirit of the article lead to the conclusion expressed by Judge Jameson 'that an alteration of the constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and, in our opinion it is quite untenable. We conclude that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal.

"Of the power of congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the constitution speaks in general terms, leaving the congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified." (p. 375.)

It will be observed that the supreme court in its opinion quoted with approval the statement of Jameson that a proposed amendment

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"has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived."

The struggle over the child-labor problem is a part of the recent history of the United States. The attempt of congress to solve the problem under the commerce clause of the constitution came before the supreme court in 1918 in *Hammer v. Dagenhart*, 247 U. S. 251, 38 S. Ct. 529, 162 L. Ed. 1101. The act was held unconstitutional.

Following its failure to control the evil of child labor under the commerce clause, congress turned to the taxing power. This second act of congress was declared unconstitutional in 1922 in *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817. Following these vain attempts to control the problem, congress in 1924 proposed the child-labor amendment.

The history of the agitation over the child-labor question since the proposed amendment is a matter of common knowledge. We have no concern with the wisdom of the proposed amendment, but of necessity must hold that the proposal "has relation to the sentiment and felt needs of today" which seems to be the criterion adopted by the supreme court in *Dillon v. Gloss*, supra. We therefore hold the proposed amendment retains its original vitality, and that the assent of the legislature was legally manifested by the adoption of senate concurrent resolution No. 3. The writ of mandamus is denied.

HUTCHISON, J., dissenting.

SMITH, J. (concurring specially): I concur in the judgment that the writ should be denied, but do not agree altogether with what is said in the opinion as to the reasons therefor, especially with reference to the second paragraph of the syllabus.

The opinion in effect places its conclusion upon a distinction between a joint resolution and a concurrent resolution. The holding is that had this been a joint resolution the lieutenant governor could not have voted on its passage. I can see no reason why this should be true. What is there about a joint resolution that its passage should be expedited, while the passage of a concurrent resolution should be made more difficult? If any distinction should be made it seems to me that as important a step as a change in the federal constitution should be hedged about with more safeguards than a

resolution expressing the opinion of the two houses of the legislature on some public question.

I prefer the view that the president of the senate has the right to vote on any matter that comes before the senate when the senate is equally divided. I believe this position may be maintained by an examination of the language of the constitution.

In the first place section 13 of article 2 does provide that a majority of all the members elected to each house voting in the affirmative shall be necessary to pass any bill or joint resolution. It is true that the president of the senate is not elected to the senate, that is, he is not elected to it as a senator, but it is hardly correct to say that he is not elected to it at all.

We must consider all the sections of the constitution. Section 1, article 1, provides for the executive branches of the state and government. Among the officers provided for are the governor and lieutenant governor. Then follow some sections that define the duties and powers of the governor. Then article 1, section 11, provides that in case of the death, impeachment, resignation, removal or other disability of the governor, the power and duties of the office for the residue of the term or until the disability shall be removed shall devolve upon the president of the senate. It should be noted that this section does not say "lieutenant governor"—it says "president of the senate." The next section is as follows:

"The lieutenant governor shall be president of the senate, and shall vote only when the senate is equally divided. The senate shall choose a president pro tempore, to preside in case of his absence or impeachment, or when he shall hold the office of governor."

The language should be noted carefully. The first statement is that the lieutenant governor "shall be president of the senate." With this provision in the constitution it is plain that when the people elect a lieutenant governor they are electing a president of the senate. Indeed, with a single exception, only one lieutenant governor ever did anything more than act as president of the senate. That is the occasion when Nathaniel Greene succeeded Governor Samuel J. Crawford, who resigned as governor in 1868 to accept a commission as colonel of the 19th Kansas Volunteers to fight Indians on the western frontier of our state.

Let us examine the next statement in the first sentence of this section. It says that the president of the senate shall vote only when the senate is equally divided. The section does not say that

the president of the senate shall not vote on the passage of a bill or a joint resolution, but it says he shall vote only when the senate is evenly divided. A fair inference to be drawn from this language is that he could vote on any matter before the senate when the senate is equally divided.

We thus have a constitution, the various provisions of which it is our duty to construe together. When this is done I have no difficulty in reaching a conclusion that the lieutenant governor is a part of the senate and has the right to vote on any matter that comes before the senate where the senate is equally divided. I do not concur in the language in the opinion wherein it is stated that the action of the senate was not a legislative act. To my mind it was a legislative act of a high degree of importance.

[fol. 58] Be it Further Remembered, that afterward and on the 6th day of October, 1937, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Motion for Rehearing, prepared by the Plaintiff herein, a copy of which Motion for Rehearing is in the words and figures as follows, to-wit;

[fol. 59] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 33459

ROLLA W. COLEMAN et al., Plaintiffs,

vs.

CLARENCE W. MILLER et al., Defendants

PETITION FOR REHEARING

Filed Oct. 6, 1937. E. E. Clark, Clerk Supreme Court

Come now the plaintiffs in the above entitled action and respectfully petition the Court for a rehearing herein for the following reasons:

1. Under the opinion filed herein and the conclusions of law and the facts found by the court, the lieutenant governor was not entitled to vote upon the resolution to ratify the proposed amendment.
2. The court erred in holding that where the legislature has rejected an amendment to the constitution proposed by Congress it may later reconsider its action and give its approval to such proposed amendment.
3. The court erred in holding that the proposed amendment retained its validity after it had been rejected by a majority of the states.
4. The court erred in holding that the proposed amendment retained its validity although more than 12 years had elapsed since its original submission by Congress.

[fol. 60] In support of the above, the plaintiffs respectfully suggest the following:

1. In its opinion filed herein this court has correctly held

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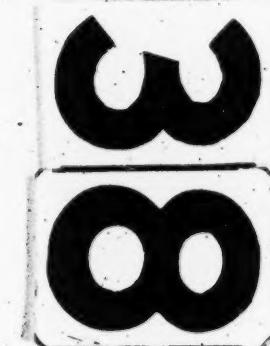
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(a) That the action of the state legislature in ratifying an amendment to the constitution is performing a federal function and not an act of legislation. In its opinion the court says that such action by the state legislature

"like the function of Congress in proposing an amendment is a federal function derived from the federal constitution and it transcends any limitation sought to be imposed by the people of a state."

"If the legislature in ratifying a proposed amendment, is performing a federal function, it would seem to follow that ratification is not an act of legislation, in the proper sense of that term."

This is almost a direct quotation from Hawke vs. Smith, 253 U. S. 221.

"Ratification is not an act of legislation; it is merely an expression of the assent of the state to the proposed amendment."

(b) That there is distinction between an act of legislation and the federal function which is performed by the legislature in ratifying the proposed amendment. The court in its opinion says:

"The power to legislate in the enactment of the laws of a state is derived from the people of the state, but the power to ratify a proposed amendment to the federal constitution has its source in that instrument."

"The act of ratification by the state derives its authority from the federal constitution, to which the state and its people alike have assented."

(c) Quotes Article 5 of the constitution of the United States which provides that a proposed amendment shall be valid.

"when ratified by the legislatures of three-fourths of the several states."

(d) " * * * That the lieutenant governor is a member of the executive department of the state. * * * "

The defendants contend he

" * * * is entitled to vote as a member of the senate [fol. 61] on the final passage of bills and joint resolutions.

As he was *not elected as a member of the senate*, this theory writes with invisible ink an amendment to section 13 of article 2, and ignores section 1 of article 1, which specifies that the lieutenant governor is a member of the executive department of the state."

"The lieutenant governor was not elected to the Senate."

The court in its opinion, therefore, has laid down three rules, two of which are well supported by decisions of the Supreme Court of the United States.

(a) that the act of ratification is a federal function and not a legislative function,

(b) that it is governed by provisions of the United States constitution and transcends any limitation sought to be imposed by the people of a state, and

(c) that the lieutenant governor is a member of the executive branch of government and was not elected a member of the Senate.

The conclusion of the court that he has a right to vote as a member of the legislature upon the resolution to ratify the proposed amendment is a non sequitur.

The constitution of the United States provides that a proposed amendment shall be valid

"when ratified by the legislatures of three-fourths of the several states."

If the lieutenant governor is not a member of the legislature, then he cannot participate in the vote to ratify. It has been held that the adoption of a resolution by Congress proposing an amendment to constitution does not need the signature of the president because it is not a legislative act. He cannot veto the proposal. He does not need to sign the proposal. The governor of the state cannot veto a resolution to ratify or reject and his signature is not necessary to the resolution to ratify or reject. He is no part of the legislature which performs this federal function [fol. 62] of ratification.

The action of the Secretary of State in certifying the resolution is not a legislative act. The only persons entitled to participate in the ratification of the proposed amendment are the members of the legislature and nothing

that Kansas can do can impose any condition or put any limitation upon the exercise of that power because as this court says

"It is a federal function derived from the federal constitution; and it transcends any limitation sought to be imposed by the people of a state. The power to legislate in the enactment of the laws of a state is derived from the people of the state, but the power to ratify a proposed amendment to the federal constitution has its source in that instrument."

The constitution of the United States requires a ratification by the legislature and therefore only those elected to be members of the legislature are entitled to vote. This court holds the lieutenant governor is not elected to be a member of the Senate. If he be not a member of the legislature, Kansas is powerless to give him a right to vote to ratify.

In regard to Numbers 2, 3 and 4 we respectfully call the court's attention to the fact that under the pleadings it is agreed that Kansas adopted an affirmative resolution rejecting the amendment and that a majority of the states shortly after the amendment was proposed by Congress, adopted similar resolutions rejecting the amendment. The proposed amendment was adopted by Congress on June 2, 1934. Without reiterating our former arguments upon these questions, we call the court's attention to a recent decision, a copy of which we have not yet been able to obtain but of which we desire to submit in support hereof, in the case of Wise, et al. vs. Chandler, et al. by the Court of Appeals of Kentucky. We have sent for a copy of the opinion and will file it for the information of the court. The Associated Press report thereon is as follows:

"Kentucky's Court of Appeals held the proposed child-labor amendment to the United States constitution was no longer before the people in an opinion today invalidating [fol. 63] Kentucky's ratification of the proposal early this year.

"The conclusions of the entire court were that a state having once acted on an amendment, whether ratifying or rejecting it, cannot thereafter change its vote without a resubmission of the question by Congress; that the proposed amendment was rejected definitely and withdrawn.

from further consideration when more than one-fourth of the states had rejected it; and that more than a reasonable time had elapsed since submission of the proposal by Congress in 1924.

"Kentucky's legislature rejected the proposal in 1926 but reconsidered and ratified it at a special session early this year. At one time, more than one-fourth of the states had rejected the amendment, although some of them reconsidered. Ratification by thirty-six states is necessary before an amendment proposal becomes part of the Constitution."

With all due respect to the court we wish to suggest that the court apparently overlooked the language of Judge Van Devanter in the Rhode Island case quoted in our brief at page 38 in which he places rejection of amendments upon the same level as ratification of amendments, and the language of Senator Davis in 1870 to the same effect, to-wit:

"The power to reject is in all respects parallel to the power to ratify,"

quoted on page 36 of our brief. This court, we believe, has given a wrong interpretation to the action of the legislatures of southern states in ratifying the fourteenth amendment. In that matter the Congress ignored utterly the former action of the legislatures of those states in rejecting the fourteenth amendment because as Congress viewed it those states were not properly constituted. The action of the states in rejecting was regarded as a nullity because the legislature as constituted had no power whatever. It was only the action of the reconstructed states which Congress would recognize. Therefore, the action to ratify the fourteenth amendment was not a reversal of previous actions of the legislatures of those states. As Seward stated in his proclamation,

"The six states next thereafter named as ratified the said proposed amendment by duly constituted and legislative bodies, etc."

[fol. 64] We respectfully submit that the position taken by Governor Bramlette and loosely stated by Judge Jameson is not the true doctrine, but that the doctrine that rejection of an amendment is just as potent and conclusive as

the adoption of an amendment as stated by Senator Davis, and by implication supported by the Supreme Court in the Rhode Island case, is the true doctrine. This is very clearly stated by Professor Grinnell in his article quoted in our original brief at page 40.

The court apparently overlooks the language of Judge Jameson in his work on the Constitution in which he says:

"The better opinion would seem to be that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."

The Supreme Court of the United States, Dillon vs. Gloss, 256 U. S. 368, 41 S. C. 510, quotes this language of Judge Jameson with approval and calls attention to the fact that

"* * * four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation."

And again in the same case:

"We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time."

In this connection it must be remembered that within three years from the time this proposal was submitted by Congress it was rejected by twenty-six states. This was an [fol. 65] expression by the states of their sentiment upon this resolution contemporaneous with the time of its submission. Since that time the amendment has been repeat-

edly rejected by other states. The record of action of the states is found in the abstract of record at pages 14 to 18. The court has indicated a judicial recognition of present public sentiment. We are, therefore, entitled to call the court's attention to the fact that since the first day of January, 1937, seventeen state legislatures have rejected or failed to ratify this so-called child-labor amendment and only three states, Kentucky, Nevada and New Mexico, not including Kansas, have voted to ratify. In some of the seventeen states the resolution to ratify was not even introduced. In others the resolution was either voted down or not acted upon. We attach hereto a short statement of the action of these legislatures.

We respectfully petition the court to grant a rehearing in the above entitled matter.

Rolla W. Coleman, Olathe, Kansas; Robert Stone, James A. McClure, Robert L. Webb, Beryl R. Johnson, Ralph W. Oman, Topeka, Kansas, Attorneys for Plaintiff.

[fol. 66] Detailed Action of State Legislatures on the So-called "Child Labor Amendment"

From January 1, 1937 to June 15, 1937

Rejected or Failed to Ratify

Alabama.—Special session adjourned on February 26 without amendment being introduced.

Connecticut.—Rejected in the House on March 18 by vote of 174 to 83. Ratified in Senate on March 31 by vote of 17 to 16. Regular session adjourned June 9.

Delaware.—Rejected in the House on April 14, by vote of 13 to 13 with 8 not voting. Reconsidered and ratified in House on April 19 by vote of 20 to 13. Regular session adjourned on April 21, with no action being taken on amendment in the Senate.

Florida.—House Constitutional Amendments Committee on April 15 voted 13 to 5 against reporting a resolution for ratification. Regular session adjourned on June 4.

Georgia.—Resolution for ratification reported favorably by Industrial Relations Committee in the House, but was allowed to die on the House Calendar with adjournment of the regular session on March 25.

Maryland.—Rejected in the House on April 2 by vote of 76 to 31. Regular session adjourned on April 5.

Massachusetts.—Rejected in the House on March 23 by vote of 188 to 13. Rejected in the Senate on March 30 by vote of 30 to 6. Regular session adjourned on May 29.

Missouri.—Rejected in the House on April 7, by vote of 74 to 51. Regular session adjourned on June 8.

Nebraska.—Rejected by the Unicameral legislature on March 26 by overwhelming *viva voce* vote. Regular session adjourned on May 15.

New York.—Rejected in the Assembly on March 9 by vote of 102 to 42. Ratified in the Senate on February 2, by vote of 38 to 12. Regular session adjourned May 7.

North Carolina.—Rejected in the House on February 1, by vote of 58 to 47. Regular session adjourned March 23.

Rhode Island.—Amendment died in Judiciary Committee of House with adjournment of regular session on April 24.

South Carolina.—Regular session adjourned on May 21 without amendment being introduced.

South Dakota.—Rejected in the House on February 11, by vote of 70 to 28. Regular session adjourned on March 5.

Tennessee.—Rejected in the House on May 7 by vote of 58 to 32. Regular session adjourned on May 21.

Texas.—Rejected in the Senate on February 23, by vote of 19 to 10. Regular session adjourned on May 22.

Vermont.—Regular session adjourned on April 10 without amendment being introduced.

[fol. 67]

* Ratifications

Kansas.—Ratified in the Senate on February 15 by vote of 21 to 20, with the Lieutenant-Governor casting the deciding vote. Ratified in the House on February 24 by vote of 64 to 52. A suit is pending to test the validity of ratification.

Kentucky.—Ratified at special session—in the Senate on January 12 by vote of 19 to 14 and in the House on January 13 by vote of 59 to 24. A suit is pending to test the validity of ratification.

Nevada.—Ratified by the Senate on January 27 by vote of 10 to 7. Ratified in the House on January 29 by vote of 30 to 8.

New Mexico.—Ratified in the Senate by vote of 14 to 10 and in the House by vote of 27 to 17 on February 11.

NOTE.—All of the foregoing are regular sessions unless otherwise indicated.

[Endorsed:] No. 33459. In the Supreme Court of the State of Kansas. Rolla W. Coleman et al., Plaintiffs, vs. Clarence W. Miller et al., Defendants. Petition for Rehearing. Filed Oct. 6, 1937. E. E. Clark, Clerk Supreme Court. Rolla W. Coleman, Olathe, Kas., Stone McClure, Webb, Johnson & Oman, 807 National Reserve Building, Topeka, Kansas, Attorneys for Plaintiffs.

[fol. 68] Be it Further Remembered, that afterward and on the 16th day of October, 1937, the same being one of the regular judicial days of the July, 1937, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka, the following proceedings among others was had and remains of record in the words and figures as follows, to-wit:

[fol. 69] IN THE SUPREME COURT OF THE STATE OF KANSAS

Topeka, Saturday, October 16, 1937.

No. 33,459

ROLLA W. COLEMAN et al., Plaintiffs,

vs.

CLARENCE W. MILLER et al., Defendants

Now comes on for decision the motion for a rehearing of this cause and thereupon after due consideration by the court it is ordered that said motion be denied.

[fol. 70] Be it Further Remembered, that afterward and on the 19th day of October, 1937, the same being one of the regular judicial days of the July, 1937, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka, the following proceedings among others was had and remain of record in the words and figures as follows, to-wit;

[fol. 71] IN THE SUPREME COURT OF THE STATE OF KANSAS

Topeka, Tuesday, October 19, 1937,

No. 33,459

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C. BRADNEY,
 J. B. Carter, Wilfrid Cavaness, Kirke W. Dale, Jesse C.
 Denious, Benjamin F. Endres, Ewing Herbert, W. E. Ire-
 land, Walter F. Jones, Walter E. Keef, Fred R. Nuzman,
 Ernest F. Pihlblad, C. W. Schmidt, Thale P. Skovgard,
 Harry M. Tompkins, Ray C. Tripp, Robert J. Tyson, N. B.
 Wall, Raimon C. Walters, George W. Plummer, Frank C.
 Pomeroy, and A. W. Relihan, Plaintiffs,

vs.

CLARENCE W. MILLER, as Secretary of the Senate of the State
 of Kansas; William M. Lindsay, as Lieutenant Governor
 and President Ex-officio of the Senate of the State of
 Kansas; H. S. Buzick, Jr., as Speaker of the House of
 Representatives of the State of Kansas; W. T. Bishop
 as Chief Clerk of the House of Representatives of the
 State of Kansas, and Frank J. Ryan as Secretary of State
 of the State of Kansas; and the State of Kansas,
 Defendants.

**ORDER STAYING THE EXECUTION AND ENFORCEMENT OF THE
 DECREE OF THIS COURT TO ENABLE SAID APPELLANTS TO
 APPLY FOR AND OBTAIN WRIT OF CERTIORARI FROM THE
 SUPREME COURT OF THE UNITED STATES**

It is Ordered that the judgment of this court be and the same hereby is stayed pending plaintiffs' petition in the Supreme Court of the United States for a writ of certiorari to this court; provided said petition for certiorari be presented in said Supreme Court within the time required by law.

[fol. 72] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 33,459

ROLLA W. COLEMAN et al., Plaintiffs,

vs.

CLARENCE W. MILLER et al., Defendants

The clerk of the court will please prepare transcript of the record in the above entitled case, including therein a copy of the printed abstract filed on May 19, 1937, and omitting from said transcript copies of all pleadings, orders and resolutions therein contained in said abstract.

Rolla W. Coleman, Robert Stone, James A. McClure,
Robert L. Webb, Beryl R. Johnson, Ralph W.
Oman, Attorneys for Plaintiffs.

Indorsed on Back: 33459. Coleman et al. v. Miller et al.
Præcipe for Transcript. Filed Oct. 25, 1937. E. E. Clark,
Clerk Supreme Court.

[fol. 73]

SUPREME COURT

STATE OF KANSAS, SS:

I, E. E. Clark, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the foregoing numbered pages 1 to 71 inclusive, constitutes a full, true and complete transcript of the record and proceedings had in the case of Rolla W. Coleman, et al., Plaintiffs vs. Clarence W. Miller as Secretary of the Senate of the State of Kansas, et al., etc., Defendants and also of the opinion of the court rendered thereon as the same now appear of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at my office in the city of Topeka, this 28th day of October, A. D. 1937.

E. E. Clark, Clerk of the Supreme Court of the State of Kansas. (Seal Supreme Court, State of Kansas.)

[fol. 74] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1937

No. —

ROLLA W. COLEMAN et al., Petitioners,

vs.

CLARENCE W. MILLER et al.

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT
OF CERTIORARI

On consideration of the motion of counsel for petitioners in the above entitled cause, and good cause therefor having been shown,

It Is Ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of Sixty (60) days from December 15, 1937.

Pierce Butler; Associate Justice of the Supreme Court of the United States.

Dated this 29th day of November, 1937.

[fol. 75] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 28, 1938

The petition herein for a writ of certiorari to the Supreme Court of the State of Kansas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

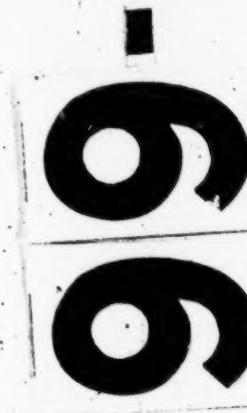
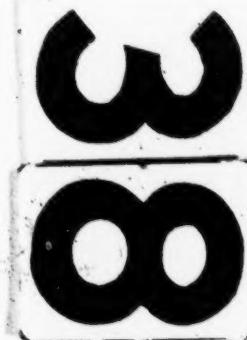
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THE PEOPLE
CLERK

**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1937.

No. ██████████ 7

**ROLLA W. COLEMAN, ET AL.,
PETITIONERS,**

vs.

**CLARENCE W. MILLER as Secretary of the Senate
of the State of Kansas, et al.,
RESPONDENTS.**

PETITION FOR WRIT OF CERTIORARI

ROBERT STONE,
JAMES A. McCLURE,
ROBERT L. WEBB,
BERYL R. JOHNSON,
RALPH W. QMAN,
Topeka, Kansas,
ROLLA W. COLEMAN,
Olathe, Kansas,

Attorneys for Petitioners.



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**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1937.

No. _____

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C.
BRADNEY, J. B. CARTER, WILFRID CAVAN-
NESS, KIRKE W. DALE, JESSE C. DENIOUS,
BENJAMIN F. ENDRES, EWING HERBERT,
W. E. IRELAND, WALTER F. JONES, WALTER
E. KEEF, FRED R. NUZMAN, ERNEST F. PIHL-
BLAD, C. W. SCHMIDT, THALE P. SKOVGARD,
HARRY M. TOMPKINS, RAY C. TRIPP, ROBERT
J. TYSON, N. B. WALL, RAIMON C. WALTERS,
GEORGE W. PLUMMER, FRANK C. POMEROY
and A. W. RELIHAN,

PETITIONERS,

vs.

CLARENCE W. MILLER as Secretary of the Senate
of the State of Kansas, WILLIAM M. LINDSAY,
as Lieutenant-Governor and President ex-officio of
the Senate of the State of Kansas; H. S. BUZICK,
JR., as Speaker of the House of Representatives of
the State of Kansas, W. T. BISHOP as Chief Clerk
of the House of Representatives of the State of Kan-
sas, and FRANK J. RYAN as Secretary of State of
the State of Kansas; and the STATE OF KANSAS,

RESPONDENTS.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
KANSAS, AND BRIEF IN SUP-
PORT THEREOF.**

To the Honorable Charles Evans Hughes, Chief Justice,
and the Associate Justices of the Supreme Court
of the United States:

The above named petitioners, plaintiffs below, present this their petition for a writ of certiorari to be directed to the Supreme Court of the State of Kansas to review a judgment of that court entered on the 16th day of September, 1937, (R. 33). Subsequently and within time a stay was granted by said court pending plaintiff's petition to the Supreme Court of the United States for writ of certiorari to said court. Afterwards, to-wit: on the 29th day of November, 1937, the time was extended by order of Honorable Pierce Butler, Associate Justice of the Supreme Court, for a period of sixty days from December 15, 1937.

The case was brought by the petitioners as an original proceedings in the Supreme Court for writ of mandamus against the defendants respecting certain proceedings by the Legislature of the State of Kansas on the adoption of what is popularly known as the Child Labor Amendment submitted to the states by Congress in 1924.

PARTIES TO THE PROCEEDINGS.

The parties are twenty-one Senators and three members of the House of Representatives of the State of Kansas, and the defendants are the officers of the House and Senate, the Secretary of State, and the State of Kansas which was made a party defendant pursuant to the order of the court and under a resolution adopted

by the Senate directing the attorney-general to appear for the State of Kansas in said action.

The Supreme Court of Kansas decided that "the right of the parties to maintain the action is beyond question." (R. 36).

QUESTION PRESENTED AND JURISDICTION.

The question presented is whether or not the proposal of Congress under date of June 2, 1924, to amend the Constitution of the United States, was ratified by the legislature of the State of Kansas in conformity with the provisions of Article 5 of the Constitution of the United States.

STATEMENT.

Senate concurrent resolution No. 3 was introduced in the Senate of Kansas on January 13, 1937, to ratify the proposal to amend the Constitution of the United States submitted by Congress on June 2, 1924. On February 15, 1937, it received twenty votes in favor of its adoption and twenty votes against its adoption, the full vote of the Senate. Thereupon, over the protest of Senators opposed to the resolution (R. 7), W. M. Lindsay, Lieutenant Governor, cast his vote in favor thereof.

The resolution was messaged to the House where it was passed and was returned to the Senate for certification.

This suit was brought as an original proceeding in mandamus to enjoin further proceedings and to compel

the Secretary of the Senate to erase the endorsement that the resolution had passed the Senate and to endorse thereon a statement that it did not pass. The Senate, by resolution, directed the Attorney General to enter appearance for the State of Kansas, (R. 20). Issues were joined, the petition appears (R. 1-18), the alternative writ was allowed (R. 18) and answers were filed by the Lieutenant Governor (R. 21), Speaker of the House (R. 26). Entry of appearance for the State was filed by the Attorney General. Formal answers were filed by each of the other defendants. On September 16, 1937, the writ of mandamus prayed for was denied (R. 31). Thereupon, a petition for rehearing was filed on the 6th day of October, 1937, and on the 16 day of October, 1937, the petition for rehearing was denied, the court thereby adhering to its former decision (R. 61).

The amendment in question is known as the Child Labor Amendment. Attached to the petition was a release dated April 20, 1935, by the Department of State (R. 13). This release was admitted by the pleadings to be true and shows the following:

On January 27, 1925, the Kansas Legislature adopted a resolution rejecting said amendment which resolution was approved January 30, 1925, and notification thereof received by the Department of State on February 2, 1925.

On or before March 18, 1927, the legislatures of 20 states had by affirmative vote rejected said amendment and notice thereof had been filed with the Department

of State. Prior to that date said amendment had been ratified by the legislatures of five states.

Some of the states which had previously rejected attempted to ratify said amendment but at the time of said release only 24 states had ratified said amendment.

SPECIFICATIONS OF ERROR.

The Supreme Court of the State of Kansas erred:

- (1) In holding that the Lieutenant Governor had a right to vote upon the resolution to ratify the proposed amendment to the Constitution of the United States;
- (2) In holding that the affirmative resolution rejecting the proposed amendment, adopted by Kansas Legislature on January 27, 1925, approved January 30, 1925, notification of which was filed with the Department of State on February 2, 1925, was not a final and conclusive action of the Legislature of the State of Kansas.
- (3) In holding that said proposal to amend having been rejected by the legislatures of more than one-fourth of the states to-wit: by 20 states at the end of 1927 was not definitely and conclusively rejected and thereby withdrawn from further consideration by the states.
- (4) In holding that an amendment submitted to the states by Congress in the year 1924 and not yet adopted by the legislatures of $\frac{3}{4}$ of the states, was in 1937 still pending and open to consideration by the legislatures of the states.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

(1) Article 5 of the Constitution provides that a proposal to amend it shall be valid as part of the Constitution

"when ratified by the legislatures of three-fourths of the several states."

Only members of a legislature are entitled to vote. The Supreme Court of Kansas in the opinion hereto attached, holds in conformity with the State Constitution that the Lieutenant Governor is not a member of the Kansas Legislature. His vote, therefore, should not be counted and without his vote the amendment failed of ratification. Ratification is a federal function, e. g. the Governor need not sign the resolution. If he should sign it would add nothing. His signature would be superfluous. Under the Constitution, Article V, only the legislature can ratify. *Leser v. Garnett*, 42 S. C. R. 217, 258 U. S. 130.

(2) The legislature in considering a proposed constitutional amendment is acting not as a legislative body but as a constitutional convention and is acting under power conferred upon it by the Constitution of the United States. 25 *Harvard Law Review* 481, *Dillon v. Gloss*, 256 U. S. 368, 41 S. C. 510, *Hawke v. Smith*, 256 U. S. 221, 40 S. C. 495. *Leser v. Garnett*, 258 U. S. 130, 42 S. C. 217. *Rhode Island v. Palmer*, 253 U. S. 350, 40 S. C. 486.

(3) An affirmative vote of the legislature to reject a proposed amendment is a final definite act of the legislature sitting as a constitutional convention. Upon adjournment of that session of the legislature such action is binding and conclusive. The vote of the Kansas Legislature reported to the Department of State, February 2, 1925, (R. 3) rejecting the proposed amendment was binding and conclusive.

In *Rhode Island v. Palmer*, 253 U. S. 350, 40 S. C. 486, "ratification" and "rejection" are used correlative. By necessity rejection is implied by the terms of Article V as an act converse to ratification.

(4) If a positive vote rejecting the proposed amendment be held conclusive and binding, then the vote of rejection by 26 states filed with the Department of State before March 18, 1927, completely defeated the amendment and it was not open for consideration by the Kansas Legislature in 1937.

(5) The action of the states, whether through the legislature or by special constitutional convention, must be reasonably contemporaneous. *Dillon v. Gloss*, 256 U. S. 368, 40 S. C. 510; *United States v. Chambers*, 291 U. S. 417, 54 S. C. 434; *Jameson on Constitution 4th Ed.* §585.

Twelve years intervene between submission in 1924 and ratification vote in 1937.

(6) The decision by this court of the questions involved and at this stage in the proceedings is essential because if Kansas certifies to the Secretary of State that the resolution has been adopted such certification is bind-

ing upon the Department of State and the records of that office with or without proclamation to the effect that the resolution was adopted by Kansas, are binding upon the courts. *Leser v. Garnett*, 258 U. S. 130, 42 S. C. 217.

(7) *Diversity of Decisions.* There has arisen a diversity of decisions of several states which should be determined by this court. Since the decision of the Supreme Court of Kansas was rendered, the Court of Appeals of Kentucky, on October 1, 1937, entered a decree in the case of James E. Wise, et al. v. Albert Benjamin Chandler, et al., 207 Ky. 1, 108 S. W. (2) 1024, involving all of the questions discussed herein, except the right of the Lieutenant Governor to vote. It held *inter alia* that

"The conclusion is inescapable that a state can act but once, either by convention or through its legislature, upon a proposed amendment, and whether its vote be in the affirmative or be negative, having acted it has exhausted its power to consider further without submission to Congress."

and further:

"There are nevertheless the additional questions as to whether or not rejection by more than one-fourth of the states at one time would not terminate the offer of the amendment by Congress, and whether or not under the decision of the Supreme Court in *Dillon v. Gloss*, *supra*, more than a reasonable time had elapsed between the submission of the amendment and the alleged ratification by Kentucky. Accepting the analogy between the submission of an amendment by Congress and the mak-

ing of an offer under the principles of the law of contracts, the conclusion that the amendment was no longer before the states at the time of the purported ratification by Kentucky in 1937 seems inevitable. *** It seems clear that the reasonable time during which the offer remained open necessarily expired at some time during the period of apparent abandonment between the end of 1927 and the revival of interest in 1933. Certainly by any yardstick more than a reasonable time had elapsed by January, 1937."

The whole record is before this court upon this application which is made within the time limit prescribed by the rules of this court.

WHEREFORE, your petitioners pray that a writ of certiorari issue to the Supreme Court of the State of Kansas to the end that the errors aforesaid may be corrected by this court.

ROBERT STONE,
JAMES A. McCLURE,
ROBERT L. WEBB,
BERYL R. JOHNSON,
RALPH W. OMAN,
All of Topeka, Kansas,
ROLLA W. COLEMAN,
Olathe, Kansas,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

PARTIES AND NATURE OF SUIT.

The plaintiffs are twenty-one Senators and three Representatives of the Legislature of the State of Kansas. The defendants are the Secretary of the Senate and other officials of the Senate and of the State of Kansas.

The suit is an original proceeding in mandamus and for declaratory judgment under the statutes of Kansas. The Supreme Court of the state has held in the opinion filed in this case that the parties have a right to maintain the suit, that the plaintiffs are proper parties, especially in view of a resolution of the Senate requiring the Attorney General to enter appearance for the State of Kansas as defendant, and that the suit is a proper action under the Kansas practice. (R. 20)

On November 29th, 1937, Honorable Pierce Butler granted to the petitioners an order extending time within which to apply for a writ for a period of sixty days from December 15, 1937.

THE FACTS.

CHRONOLOGY.

On January 2, 1924, the Sixty-eighth Congress proposed the following amendment to the Constitution:

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Section 2. The power of the several states is unimpaired by this article except that the operation of the state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

On *January 30, 1925*, the legislature of the State of Kansas adopted a resolution *affirmatively rejecting* the proposed amendment. (R. 3)

February 2, 1925; notice thereof was filed with the Department of State. (R. 5)

March 18, 1927. On this date and prior thereto twenty-six states adopted resolutions affirmatively rejecting said amendment and filed notice thereof with the Department of State. Only five states had at that time ratified said amendment. (R. 11)

January 1, 1932. Between 1927 and January, 1932, no action was taken in any state, either ratifying or rejecting said amendment, except in 1931 the Legislature of Colorado passed a resolution of ratification. (R. 14)

December 19, 1917. The Congress submitted the Eighteenth Amendment and placed a limit of seven years within which it should be ratified.

May 3, 1932. Congress proposed the Twentieth Amendment with a limitation of seven years.

February 20, 1933. Congress proposed the Twenty-first Amendment with a limitation of seven years.

January 13, 1937. There was introduced in the Kansas Senate concurrent resolution No. 3 to ratify the amendment proposed by Congress on January 2, 1924. (R. 5)

February 15, 1937. This resolution came to a vote in the Kansas Senate. Twenty Senators voted in favor and twenty Senators voted against the adoption of said resolution. Forty senators is the maximum number under the Kansas Constitution (Infra). Thereupon, W. M. Lindsay, Lieutenant Governor, over the protest of the opponents of said resolution, cast a vote in favor of its adoption. The resolution was messaged to the House, where it was passed, returned to the Senate for further procedure and certification, but this suit was filed. (R. 8)

PROVISIONS OF THE KANSAS CONSTITUTION.

The Constitution of the State of Kansas provides:

Article I, Section 1:

"The executive department shall consist of a governor, lieutenant governor, secretary of state, ***; who shall be chosen by the electors of the state at the time and place of voting for members of the legislature, ***."

Section 12:

"The lieutenant governor shall be president of the senate, and shall vote only when the senate is equally divided. The senate shall choose a president *pro tempore*, to preside in case of his absence or impeachment, or when he shall hold the office of governor."

Article II, Section 1:

"The legislative power of this state shall be vested in a house of representatives and senate."

Section 2:

"The number of representatives and senators shall be regulated by law, but shall never exceed one hundred and twenty-five representatives and forty senators. ***".

Section 13:

"A majority of all the members elected to each house shall have the right to protest against any act or resolution; and such protest shall, without delay or alteration, be entered on the journal."

ARGUMENT.

Under the above stated facts, which are undisputed, it is the contention of the plaintiffs—petitioners:

I.

That the Lieutenant Governor was not entitled to vote on the adoption of Senate concurrent resolution No. 3.

Under the Constitution of the State, the Lieutenant Governor is a member of the executive department and not of the legislative department. In this case the Supreme Court of the State of Kansas has so held. (R. 37) The consideration of a proposed constitutional amendment is regulated not by state constitution, laws or regulations, not by any parliamentary rule of procedure which may be adopted by the legislature, but by the Constitution of the United States. Article V of the Constitution of the United States provides for the submission of the proposed amendment to the states either by a convention called for that express purpose

or by the legislature. The legislature is that representative body in each state which has been established for the purpose of passing laws. The action by the legislature in acting upon the proposed amendment is not a legislative act, and does not require the signature of the governor, although the laws may require his signature to statutes. He cannot veto the action taken in ratifying or rejecting the amendment although he may veto the action of the legislature in the passage of laws or joint resolutions. It is contemplated by Article V that the people of the State shall ratify or reject through their representatives. When the legislature sits, in considering a proposed amendment, it is acting as though it were a convention. The action of the legislature in ratifying or rejecting the amendment is exactly the same as the action of a specially elected convention called for the consideration of the measure. Therefore, only those who have been elected as representatives of the people have the right to vote on the question of ratification or rejection. The Constitution of Kansas might have made the Lieutenant Governor a member of the Senate, but it did not do so. It gives him a restricted right to vote upon some matters that come up in the legislature when it is acting as a legislature. That power, however, is by implication and not by direct provision. It is found only in Article I, Section 12, above quoted,

“and shall vote only when the senate is equally divided.”

Suppose it had said directly that the Lieutenant Governor is a member of the executive department and is not a member of the legislative department, is not a member of the Senate but he shall have the right to vote upon any proposals to amend the Constitution of the United States, which may be submitted by the Congress. Of course, that provision could not affect Article V, which says that the proposal to amend shall become effective when ratified by three-fourths of the *legislatures*. Yet that is exactly the effect of the decision of the Kansas court which finds that he is not a member of the Senate but that he may vote on a resolution to ratify.

II.

An affirmative vote to reject the proposed amendment is final.

When the Kansas Legislature of 1925 adjourned, its action in rejecting the proposed amendment became the final conclusion. In considering the amendment it was acting as a constitutional convention and not as a legislature. The affirmative action rejecting the amendment is just as binding as an act of adoption.

In *Rhode Island v. Palmer*, 253 U. S. 350, 40 S. C. 486, this court speaks of ratification and rejection as though they are corollary terms, using the following language:

“The referendum provisions of state constitutions and statutes cannot be applied, consistently with the constitution of the United States, in the ratification or rejection of amendments to it.”

As stated by Prof. Orfield in *25 Illinois Law Review*, page 481:

"Conventions like legislatures are mere agents of the people. The ratifying process is equivalent to a roll call of the states. ***"

In the same article, Prof. Orfield says:

"It is the people acting through the legislature as a constitutional convention and not the state through its legislative body."

It would hardly be contended, if the state had called a constitutional convention for the purpose of considering a proposed amendment and such convention passed the resolution, either adopting or rejecting the amendment, and notice of such vote were filed with the department of the state and the convention adjourned, that the state could assemble another convention and take another action upon a proposed amendment.

III.

But if a state under those circumstances, by calling a new convention, could reconsider its former action, it could hardly be contended, that after more than one-fourth of the states, and in this case, more than half of the states, to-wit, twenty-six, had called constitutional conventions, had affirmatively rejected the amendment and filed notice thereof with the secretary of state, with only five votes in favor of adoption, the action of the convention was not final or conclusive.

It is our contention that when more than one-fourth of the states on and prior to March 18, 1927, had filed notice of positive and definite rejection of the amendment, the

amendment was thereby defeated and withdrawn from further consideration.

IV.

It is the contention of the plaintiffs that the amendment submitted on June 2, 1924, lost its potency before 1937, by June 2, 1931, seven years after its submission and at least long before 1937.

As stated by this court in Dillon v. Gloss, 256 U. S. 368, 41 S. C. 510;

"An alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."

And the court continues:

"We conclude that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal."

And again,

"We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when

proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same, which, of course ratification scattered through a long series of years would not do."

l. e. 512.

The record in this case shows that at the time the amendment was proposed, more than one-fourth of the states took prompt action and rejected it, thus showing the contemporaneous sentiment of the people. The rejection at that time by more than twenty states was a definite and positive action contemporaneous with the proposal. Action taken by the states in 1937 would not be contemporaneous with the action of Congress in 1924, in proposing the amendment. If Congress at this time entertain the same sentiment as the Sixty-eighth Congress, which proposed the amendment, then it can resubmit the same or a similar amendment which can be acted upon by this generation in approving or rejecting the proposal.

CONFLICT OF DECISIONS.

There has arisen a conflict of decisions as to points two, three and four. Upon these points the Court of Appeals of Kentucky, in the case of Wise, et al. versus Chandler, et al., has rendered an opinion which is contrary to the holding of the Supreme Court of Kansas

upon these propositions. It is there held that an affirmative vote to reject the proposed amendment is binding, final and conclusive and when once taken by a state cannot be changed; that when more than one-fourth of the states had definitely rejected the proposed amendment, said amendment was thereby defeated and withdrawn from further consideration, and also that after a lapse of more than seven years, to-wit: thirteen years, the proposed amendment submitted by Congress on June 2, 1924, lost its potency and is no more subject to consideration by the respective states. This case was decided on October 1, 1937, 207 Ky. 1, 108 S. W. (2) 1024. It is our understanding that an application for writ of certiorari will be made by the Attorney-General of Kentucky for a review of said cause. Arrangements have been made to synchronize that application with the application herewith presented. The situation in respect to the Kentucky appeal is set out in two letters which are hereto attached as part of an appendix, one from Judge Lafon Allen to the undersigned Robert Stone, and the other from Judge Allen to the Assistant Attorney-General of Kentucky, marked Exhibits A and B respectively.

IN CONCLUSION.

Your petitioners submit that the final determination by this court of the questions involved in this case is of the utmost importance to the public generally as well as to the State of Kansas. Your petitioners submit that under the authorities above cited this court should determine that:

1. The Lieutenant-Governor of the State of Kansas had no right to vote upon a question involving the adoption or rejection of the proposed amendment to the Constitution of the United States because he is not a part of the Legislature and under the Constitution of the United States the proposal was not submitted to him.
2. The Legislature of Kansas having definitely and affirmatively rejected the proposed amendment to the Constitution of the United States, had acted finally and definitely upon the question and could not again consider the proposed amendment.
3. At the time of the submission of the proposed resolution in the Legislature of 1937, more than one-fourth of the legislatures of the states, to-wit: more than twenty, having definitely rejected said amendment, the amendment was no longer before the states for consideration and had been automatically thereby withdrawn from consideration.
4. The proposed amendment to the Constitution having been submitted by Congress on June 2, 1924, and not having been adopted by a majority of the states within that long period of nearly thirteen years had

already lost its potency and by reason of the lapse of time had fallen into innocuous desuetude and therefore was not subject to consideration by said legislature.

Respectfully submitted,

ROBERT STONE,

JAMES A. McCLURE,

ROBERT L. WEBB,

BERYL R. JOHNSON,

RALPH W. OMAN,

All of Topeka, Kansas,

ROLLA W. COLEMAN,

Olathe, Kansas,

Attorneys for Petitioners.

APPENDIX.**EXHIBIT "A."****ALLEN & CLARKE****KENTUCKY HOME LIFE BUILDING
LOUISVILLE, KENTUCKY****LAFON ALLEN****OLDHAM CLARKE**

February 3, 1938

Robert Stone, Esq.
Stone, McClure, Webb, Johnson & Oman
National Reserve Building
Topeka, Kansas

Re: Child Labor Amendment Cases

Dear Mr. Stone:

I enclose herewith a letter which I have just addressed to Assistant Attorney-General Jones at Frankfort, from which you will learn that there has been a disappointing delay in the preparation of his petition.

I had repeatedly explained to him that you had obtained a sixty day extension of time, expiring February 15th., in order to give him an opportunity to prepare his petition, so that both of them might be filed at substantially the same time. By great diligence and a good deal of cooperation on our part, our case has been pushed through the lower court and the Court of Appeals for the second time so that on December 21, 1937 we had procured an affirmance by the Court of Appeals of the judgment entered by the lower court, in conformity with the opinion of the Court of Appeals upon the first appeal. By consent, the mandate of the latter court was issued forthwith, without waiting for the expiration of the thirty days allowed for a petition for

re-hearing. Consequently, General Jones was in a position to file his petition in the Supreme Court at any time after December 21st. The regular session of the Kentucky legislature began on the first of the year and the Attorney-General's office has no doubt been especially busy with hearings on various matters arising from that session. I wrote General Jones on January 22nd, asking him to give me some idea when his petition would be ready, so that I might advise you. Having had no reply to that letter, I telephoned him on the day before yesterday, with the result explained in the enclosed copy of my letter to him of today.

In view of this situation, I think you should be prepared to file your petition before your time expires, without reference to what has been done here. General Jones has said to me that he would make an effort to get his petition ready by that time but I am afraid that this will not turn out to be the case. I have been wondering whether it would not be possible to make some statement in your petition as to the decision in the Kentucky case and the probability that a petition will be filed in that case. If the Supreme Court knew that preparations were being made to bring the Kentucky judgment up for review, it might delay action on your petition until the Kentucky petition had reached it. I trust that you will find it possible to do something of this kind,

With kindest regards, I am

Yours very sincerely,

Lafon Allen.

LA:JC

EXHIBIT "B."

ALLEN & CLARKE

KENTUCKY HOME LIFE BUILDING
LOUISVILLE, KENTUCKYLAFON ALLEN
OLDHAM CLARKE

February 3, 1938

Hon. J. W. Jones
Assistant Attorney-General
Frankfort, Kentucky

Re: Chandler v. Wise

Dear General:

Referring to our telephone conversation of the day before yesterday, I was sorry to learn that you had not been able to complete your petition for writ of certiorari in the above case, but trust that you will be able to have it ready for filing by the 15th. of this month, in order that it may accompany the petition in the Kansas case, which must be filed on or before that date. It is not necessary for me to go into any explanation of the importance of having these two cases heard together, since that has been the subject of both correspondence and conversations between us during the past two months or more.

I am writing Mr. Stone, of Topeka, to tell him of the delay in the preparation of your petition, and to advise him that he should file his petition before his time expires, even though yours is not ready at that time.

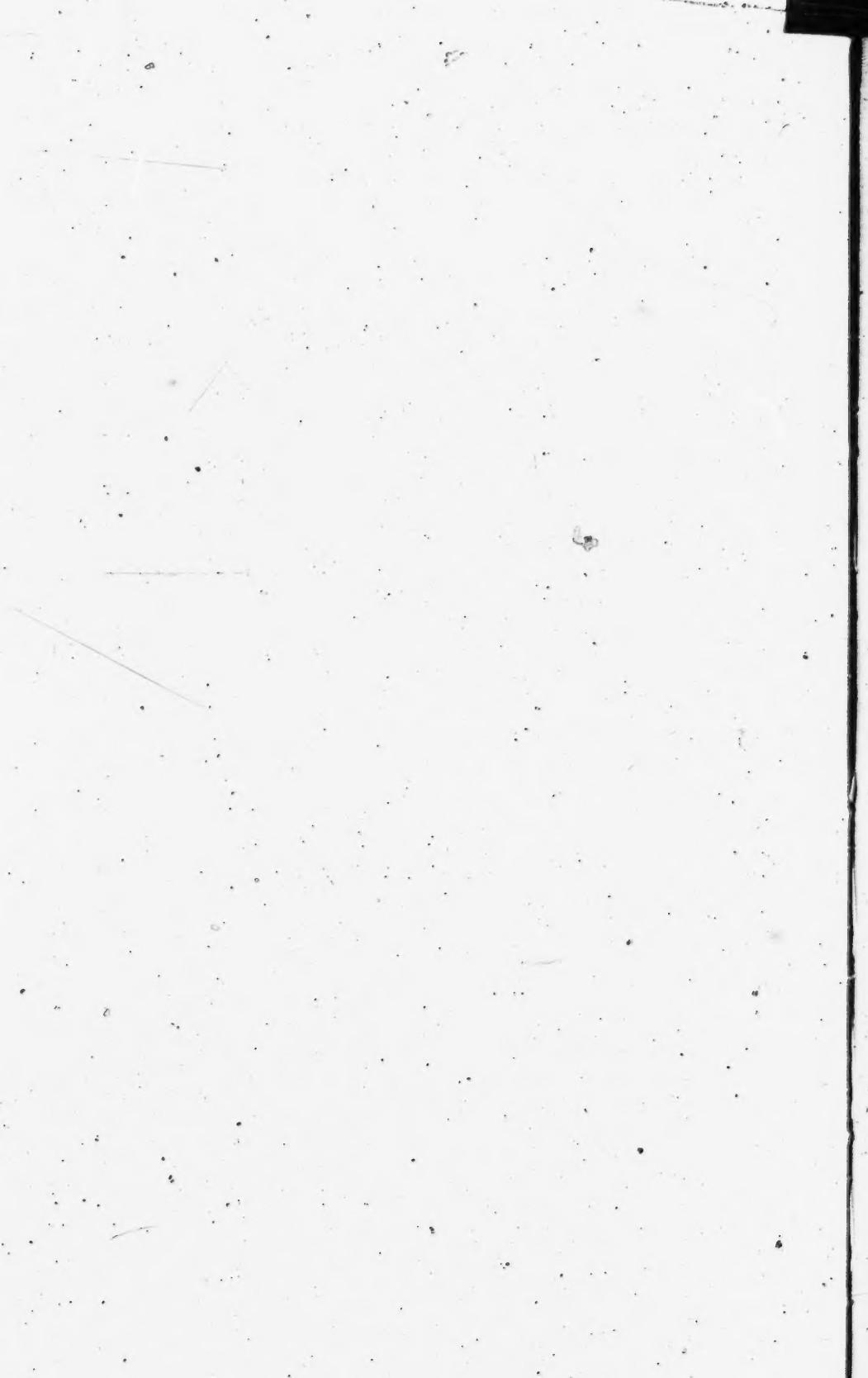
I realize how busy you are but I take the liberty of urging again the importance of getting these two petitions to Washington at substantially the same time, since this showing that there were conflicting decisions from the highest court of two states upon these important

constitutional questions will probably induce the Supreme Court to take jurisdiction, when they might not do so if only one petition was presented for their consideration.

Yours very sincerely,

Lafon Allen.

LA:JC



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Office - Supreme Court, U. S.
F I L E D

AUG 13 1938

CHARLES ELMORE CROPLEY
CLERK

**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1938.

No. [REDACTED]

7

ROLLA W. COLEMAN, W. A. BARRON,
CLAUDE C. BRADNEY, ET AL.,
PETITIONERS,

vs.

CLARENCE W. MILLER, AS SECRETARY OF THE
SENATE OF THE STATE OF KANSAS, ET AL.,
RESPONDENTS.

BRIEF ON BEHALF OF PETITIONERS.

ROBERT STONE,
JAMES A. McCLURE,
ROBERT L. WEBB,
BERYL R. JOHNSON,
RALPH W. OMAN,
All of Topeka, Kansas,
ROLLA W. COLEMAN,
Olathe, Kansas,

Attorneys for Petitioners.



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**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1938.

No. 796

**ROLLA W. COLEMAN, W. A. BARRON,
CLAUDE C. BRADNEY, ET AL.,
PETITIONERS,**

vs.

**CLARENCE W. MILLER, AS SECRETARY OF THE
SENATE OF THE STATE OF KANSAS, ET AL.,
RESPONDENTS.**

BRIEF ON BEHALF OF PETITIONERS.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Kansas is reported in 146 Kan. 390, and is printed in full in the record at pages 34 to 49.

JURISDICTION—RULE 12.

The appellants have complied with Rule 12. Order allowing certiorari was filed March 28th, 1938.

The questions involved in this case arise under Art. 5 of the Constitution of the United States relating to the submission to and adoption by the respective legislatures

of the states of proposed amendments to the Constitution. An amendment to the Constitution of the United States, popularly known as the Child Labor Amendment, was proposed on June 2nd, 1924, by the 68th Congress, to become valid when ratified by the legislatures of three-fourths of the several states.

CHRONOLOGY OF EVENTS.

On January 30, 1925, the legislature of the state of Kansas adopted a resolution affirmatively rejecting the proposed amendment. (R. 3)

On February 2, 1925, notice thereof was filed with the Department of State. (R. 5)

March 18, 1927. On this date and prior thereto twenty-six states adopted resolutions affirmatively rejecting said amendment and filed notice thereof with the Department of State. Only five states had at that time ratified said amendment. (R. 11)

December 19, 1917. The Congress submitted the Eighteenth Amendment and placed a limit of seven years within which it should be ratified. (R. 12)

February 20, 1933. Congress proposed the twenty-first Amendment with a limitation of seven years. (R. 12)

January 13, 1937. There was introduced in Kansas Senate concurrent resolution No. 3 to ratify the amendment proposed by Congress on January 2, 1924. (R. 5)

February 15, 1937. This resolution came to a vote in the Kansas Senate. Twenty Senators voted in favor and twenty Senators voted against the adoption of said resolution. Forty Senators is the maximum number under the

Kansas Constitution (*infra*). Thereupon, W. M. Lindsay, Lieutenant Governor, over the protest of the opponents of said resolution, cast a vote in favor of its adoption. The resolution was messaged to the House, where it was passed, returned to the Senate for further procedure and certification, but this suit was filed. (R. 6, 7, 8)

CONSTITUTIONAL PROVISIONS.

The pertinent provisions of the Constitution of the United States and of the Constitution of the State of Kansas are as follows:

Art. 5. Constitution of the United States:

"Congress *** shall propose amendments to this constitution *** which *** shall be valid to all intents and purposes as part of this Constitution when ratified by legislatures of three-fourths of the several states. *** "

The Constitution of the State of Kansas:

Art. 1:

" § 1. The executive department shall consist of a governor, lieutenant-governor, secretary of state *** ; who shall be chosen by the electors of the state at the time and place of voting for members of the legislature, *** and shall hold their offices for the term of two years.

" § 12. The lieutenant governor shall be president of the Senate, and shall vote only when the senate is equally divided. The senate shall choose a president pro tempore, to preside in case of his absence or impeachment, or when he shall hold the office of governor.

"§ 15. The officers mentioned in this article shall at stated times receive for their services a compensation to be established by law which shall neither be increased nor diminished during the period for which they shall have been elected.

Art. 2:

"§ 1. The legislative power of this state shall be vested in a house of representatives and senate."

"§ 2. The number of representatives and senators shall be regulated by law, but shall never exceed one hundred twenty-five representatives and forty senators *** ."

"§ 3. The members of the legislature shall receive as compensation for their services the sum of three dollars for each day's actual service at any regular or special session, and fifteen cents for each mile, etc., but such compensation shall not in the aggregate exceed the sum of *** one hundred fifty dollars for each session *** nor more than ninety dollars for any special session."

"§ 13. A majority of all the members elected to each house, voting in the affirmative, shall be necessary to pass any bill or joint resolution."

"§ 29. *** members of the house of representatives shall be elected for two years, and members of the senate shall be elected for four years."

The Act of Congress of April 20, 1818 (U. S. Rev. Stats. § 205, 5 U. S. C. A. § 160), putting upon the Secretary of State certain duties in connection with the announcement of the adoption of an amendment, is as follows:

"Amendments to Constitution. Whenever official notice is received at the Department of State that

any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

PROCEEDINGS IN COURT.

This suit was brought as an original proceeding in mandamus to enjoin further proceedings and to compel the Secretary of the Senate to erase the endorsement that the resolution had passed the Senate and to endorse thereon a statement that it did not pass. The Senate by resolution directed the Attorney-General to enter appearance for the State of Kansas. (R. 20)

There was no real issue of facts. The matter was submitted to the Supreme Court of the State, and on September 16, 1937, the writ of mandamus prayed for was denied. On the 16th of October, 1937, the petition for rehearing was denied. (R. 31)

Writ of certiorari was granted by this court, as above stated, on March 28, 1938.

SPECIFICATIONS OF ERROR.

The Supreme Court of the State of Kansas erred:

- (1) In holding that the lieutenant-governor had a right to vote upon the resolution to ratify the proposed amendment to the Constitution of the United States;
- (2) In holding that the affirmative resolution rejecting the proposed amendment, adopted by the Kansas

Legislature on January 27, 1925, approved January 30, 1925, notification of which was filed with the Department of State on February 2, 1925, was not a final and conclusive action of the legislature of the State of Kansas;

- (3) In holding that said proposal to amend having been rejected by the legislatures of more than one-fourth of the states, to wit: by 20 states at the end of 1927, was not definitely and conclusively rejected and thereby withdrawn from further consideration by the states.
- (4) In holding that an amendment submitted to the states by Congress in the year 1924 and not yet adopted by the legislatures of three-fourths of the states, was in 1937 still pending and open to consideration by the legislatures of the states.

ARGUMENT.

The opinion of the Supreme Court of Kansas is printed in full in the record. (R. 33) The Kansas Court held that:

"The right of the parties to maintain the action is beyond question." (R. 36)

The court also states:

"There is no dispute as to the facts." (R. 35)

THE RESOLUTION TO RATIFY THE PROPOSED AMENDMENT DID NOT PASS BECAUSE IT DID NOT RECEIVE A MAJORITY OF THE VOTES OF THE SENATE. THE LIEUTENANT GOVERNOR, WHO CAST THE DECIDING VOTE, WAS NOT A MEMBER OF THE LEGISLATURE AND WAS NOT ENTITLED TO VOTE.

Article V of the Constitution of the United States provides two methods of ratification of proposed constitutional amendments, (a) by legislatures, and (b) by conventions of the several states. Congress makes the choice. In submitting the child labor amendment, it chose ratification by the legislatures. Under either method of ratification the action is by a deliberative assemblage representative of the people. Whether the ratification by legislature or by a special convention called for that purpose, it is not an act of legislation within the proper sense of the word but is only the expression of the assent or dissent of the people of the respective states to a proposed amendment.

Hawke v. Smith, 253 U. S. 221; 40 S. C. 495.

When the Congress provided that this amendment should be ratified by the legislature it designated and defined the deliberative assembly which should consider the amendment. The function of Congress in proposing an amendment and in defining the method by which it shall be considered is a Federal function derived from the Federal Constitution, and it transcends any limits sought to be imposed by the people of a state. A state, therefore, has no power to change or enlarge the deliberative assemblage to which Congress has referred the mat-

ter. The legislature of the State of Kansas to which this matter was referred is a body created and defined by the constitution of the State of Kansas. It is composed of a House of Representatives consisting of 125 members elected from their respective districts for a term of two years, and a Senate composed of 40 members elected from their respective districts for a term of four years. The lieutenant-governor is not a part of the legislature. His office is created and defined by the Constitution of the State of Kansas. He is a member of the Executive Department chosen by the electors of the whole state for a term of two years. There is no Constitutional provision with reference to his compensation. The compensation of the members of the Senate and the House is fixed at \$3.00 per day not to exceed \$150.00 for the regular session nor more than \$90.00 for any special session, together with mileage. It is true that part of the duty of the lieutenant-governor is to preside over the Senate with the right to vote only in case of a tie and not then upon any joint bill or resolution, but that does not make him a member of the legislature. The governor must sign laws before they become operative and may veto acts of the legislature but that does not make him a member of that body any more than the power of veto on the part of the President makes him a member of Congress. The proposal to amend the Constitution has been held by this court not to be a legislative function. The President, therefore, is not required to sign a resolution proposing an amendment nor has he the power to veto it.

In *Hawke v. Smith*, supra, this court said in referring to the case of *Hollingsworth v. Virginia*, 3 Dall. 378:

"In that case it was contended that the amendment had not been proposed in the manner provided in the constitution as an inspection of the roll call showed that it had never been submitted to the president for his approval in accordance with Article 1, Section 7 of the constitution. The attorney general answered that the case of amendments is a substantive act unconnected with the ordinary business of legislation and not within the policy or terms of the constitution investing the president with a qualified negative on the acts and resolutions of congress. In a footnote to this argument of the attorney general, Chase said:

'There can, surely, be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the constitution.'

The court by a unanimous judgment held that the amendment was constitutionally adopted.

In the same case this court held that the power to legislate is derived from the people of the state but the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from a Federal Constitution to which the state and its people have alike assented. This court further said:

"Such legislation, however, is entirely different from the requirement of the constitution as to the expression of assent or dissent to a proposed amendment to the constitution. In such expression no legislative action is authorized or required."

The same rule is again declared by this court in *Leser v. Garnett*, 256 U. S. 130; 42 S. C. 217.

The State of Kansas in the opinion from which this appeal is taken recognizes and declares the same rule. (R. 36) Therefore, the only assemblage qualified to act upon the proposed amendment is the legislature of the State of Kansas which does not include the lieutenant-governor. We understand the decision of the Supreme Court of Kansas to hold that the lieutenant-governor is not a member of the Senate or of the legislature. In speaking of the contention of the defendants, the court said:

"On the other hand defendants contend that the lieutenant-governor is entitled to vote as a member of the senate on the final passage of bills and joint resolutions. As he was not elected as a member of the senate this theory writes with invisible ink an amendment to Section 13 of Article II which specifies that the lieutenant-governor is a member of the Executive Department of the state." (R. 38)

And again,

"The lieutenant-governor was not elected to the Senate," (R. 39)

We concur with the court in holding that the lieutenant-governor is not a member of the Senate, but believe the court to be in error in further holding that because he is made the presiding officer of the Senate and because the Constitution allows him to cast the deciding vote upon some matters other than bills or joint resolutions he can, therefore, vote upon the ratification

of a proposed amendment to the Federal Constitution. That privilege cannot be derived from any parliamentary rule or usage. It is true that by the Constitution he is given by implication the power to vote in case of a tie (Article I, Section 12), but this does not make him a member of the legislature, and if he be not a member of the legislature, then under Article V of the Federal Constitution he has no right to vote upon a resolution of ratification. The legislature in considering a proposed amendment sits like a convention called for the purpose of considering the amendment under the second method provided by Article V. It could hardly be contended that if Congress had provided that the matter should be submitted to a convention in the several states and that in Kansas the convention should consist of a definite number of members elected from their respective districts that the state could add another member who should preside over the body and have the right to vote in case of a tie. Yet that is the result of the decision of the Supreme Court of Kansas. It holds as it must under the provisions of the Constitution of Kansas that the legislature consists of 40 senators and 125 representatives and that the lieutenant-governor is not a member of the Senate although he is the presiding officer. It then allows him to cast the deciding vote with the result that a man who is not a member of the legislature and has never been chosen as a representative of the people to sit in a convention or legislature to ratify a proposed amendment deter-

mines for the whole state that the amendment shall be ratified. To say that the legislature of the state in ratifying a proposed amendment to the Constitution derives its power wholly from Article V of the Constitution; that the act of the legislature in ratifying the amendment is a judicial function and not a legislative function; that the lieutenant-governor is not a member of the legislature *but may vote in case of a tie* is a non sequitur. The lieutenant-governor by virtue of his office as a presiding officer with its attendant and customary duties may be a part of the legislative power, but he is not a part of the legislature any more than the governor who may sign or veto an act.

WHEN THE KANSAS LEGISLATURE OF 1925 ADOPTED AN AFFIRMATIVE RESOLUTION TO REJECT THE AMENDMENT, FILED NOTIFICATION THEREOF WITH THE SECRETARY OF STATE AND ADJOURNED SINE DIE, IT HAD COMPLETED ITS ACTION AND KANSAS HAD EXHAUSTED ITS POWER WITH REFERENCE TO THE PROPOSED AMENDMENT.

When Congress proposes amendments, it may provide that the amendment may be ratified by the legislatures of the several states or by conventions in the several states. The usual method is the one followed in the "child labor amendment". In this case, Congress by two-thirds vote of each house proposed the amendment and provided that it should be ratified by the legislatures of the several states instead of by conventions. The wording of the proposal is as follows:

"JOINT RESOLUTION.

"Proposing an amendment to the constitution of the United States of America in congress assembled (two-thirds of each house concurring therein), that the following article is proposed as an amendment to the constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the constitution:

"Article —,

"Section 1. That congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

"Sec. 2. That power of the several states is unimpaired by this article, except that the operation of the state laws shall be suspended to the extent necessary to give effect to legislation enacted by the congress."

Congress, therefore, provided that the method of ratification should be by the legislatures of the several states rather than by conventions. If Congress had provided that the proposed amendment should be ratified by conventions in three-fourths of the several states, there would appear to be little doubt that when a convention called pursuant to such proposal had been held in any particular state, the action taken by such convention duly certified to and filed with the secretary of state would upon adjournment sine die of that convention become a binding act of the state and would be conclusive upon any later convention which the state might

assume to call for the purpose of again considering the action already taken.

When ratified by the legislatures of the several states, the legislatures are acting not in a legislative capacity but as though representing the people in conventions assembled for the particular purpose of ratifying or rejecting the proposed amendment. When the legislature of a particular state has taken affirmative action either adopting or rejecting the proposed amendment, it has completed its task as such a convention representative of the people of the state. When that action has been certified to the secretary of state and the legislature has adjourned, its task is completed, its power is exhausted. A subsequent legislature cannot assume to undo what a previous legislature acting as a constitutional convention has already done. The vote of that state has been cast. The matter of the amendment is no longer before that particular state. It would indeed be a strange thing if the act of the legislature of Kansas of January 30, 1925, taken less than a year after the proposal to amend was submitted by Congress, and therefore contemporaneous with it, could be set aside and held for naught by a resolution adopted by the legislature of Kansas in 1937, nearly 13 years after the amendment was proposed by Congress, and, therefore, not contemporaneous with it. In his treatise on Constitutional Conventions, 4 Ed., section 586, Jameson says:

"If an amendment to the Federal Constitution should be proposed by Congress and submitted to state conventions instead of to the legislatures, the

powers and disabilities of the two classes of bodies in respect to the amendment would, it is conceived, be precisely the same."

In 25 Harvard Law Review 481, Professor Orfield in considering the Federal amending power said:

"Conventions like legislatures are mere agents of the people. The ratifying process is equivalent to a roll call of the states. The Constitution of the United States was prepared and submitted as coming from the people and not from the states. It was submitted to conventions of the several states. The action of amending the Constitution is an action of the people and not of the states. This is the reason why the legislature in ratifying an amendment to the Constitution is *acting under power conferred upon it by the Constitution of the United States and not in its capacity as a legislature under the power of the constitution of the state.* It is the people acting through the legislature as a constitutional convention and not the state acting through its legislative body."

In *Dillon v. Gloss*, 41 S. C. 510, 256 U. S. 368, this court speaking by Justice Vandeventer of the two modes of proposals said:

"When proposed in either mode, amendments to be effective must be ratified by the legislatures or by conventions in three-fourths of the states 'as the one or the other mode of ratification may be proposed by the congress' thus the people of the United States by whom the constitution was ordained and established have made the condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified by three-fourths of them. The plain meaning of this is (a) that all amendments must have the

sanction of the people of the United States, the original fountain of power acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the peoples' will and be binding on all."

The recent decisions of this court holding that the act of the legislature in ratifying or rejecting a proposed amendment is not a legislative act but is an act more in the nature of a constitutional convention were foreshadowed in an article written by the late Chief Justice Taft before he went upon the Supreme Bench in which he says:

"That it was the intention to submit the ratification to the popular representative bodies named, and not to their constituencies, is clearly shown by the alternative for the state legislatures which under the Articles Congress may in its discretion substitute as the ratifying agencies. These are conventions in the state called for the purposes. These are the same kind of representative bodies which adopted the Constitution and exclude necessarily any idea of further submission to the people directly of the proposed amendment.

"This, too, disposes of the argument adopted by the Washington and Ohio courts, that the word 'Legislatures' means the law-making power of the states, for certainly a convention called for the purpose of ratifying an amendment is not part of the law-making power of the state. ***

"If proposal or ratification were mere law making, then under section 7, Article I, action of the two Houses of Congress must be submitted to the President for his approval or disapproval. Yet in

Hollingsworth v. Virginia it was held that a proposal by two-thirds of both Houses was sufficient under the article without submitting it to the President for his approval or disapproval, and this view has been confirmed by the practice since and by express resolutions of the Senate."

In *Hawke v. Smith*, 253 U. S. 221, 40 S. C. 495, Justice Day speaking for the court said:

"The method of ratification is left to the choice of Congress. Both methods of ratification by legislatures or conventions call for action by deliberative assemblages representative of the people which it was assumed would voice the will of the people. *** What did the framers of the Constitution mean in requiring ratification by 'legislatures'? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article 1, section 2, prescribes the qualifications of electors of Congressmen as those 'requisite for electors of the most numerous branch of the state Legislature'. Article 1, section 3, provided that Senators shall be chosen in each state by the Legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amendment, which made provision for the election of Senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state Legislature."

After considering the meaning of the word "legislatures" as found in different sections of the Constitution of the United States and calling attention to the

Constitution of Ohio which now provides for referendum vote to which the officials of the state were seeking to submit a proposed amendment, he said:

"The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.

"At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment. *Hollingsworth et al. v. Virginia*, 3 Dall. 378, 1 L. Ed. 644.

"The court by a unanimous judgment held that the amendment was constitutionally adopted.

"It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from the Federal Constitution to which the state and its people have alike assented."

"This view of the amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 et seq. Any other view might

lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states."

In *Rhode Island v. Palmer*, 253 U. S. 350, 40 S. C. 486, it was held that the referendum provisions of state constitutions cannot be applied consistently with the Constitution of the United States in the ratification or rejection of amendments to it. In *Leser v. Garnett*, 256 U. S. 130, 42 S. C. 217, the court says:

"That the function of a state legislature in ratifying a proposed amendment to the Federal Constitution like the function of Congress in proposing the amendment is a federal function derived from a Federal Constitution and it transcends any limitations sought to be imposed by the people of the state."

While there is a diversity of opinion upon the subject, it would seem to follow as a conclusion from the above rulings and from the logic of the case that the action of a legislature once taken and recorded in the office of the Department of State would be a final and conclusive action of the people of the state represented by that legislature the same as though the people had assembled in a state convention for the purpose of considering the amendment. A contrary doctrine arose over the amendments that were submitted following the Civil War when there was great sectional disturbance.

The Thirteenth Amendment proposed in February, 1865, was rejected by 4 of the Southern states in 1866,

and by Virginia in January, 1867, all acting through the legislatures which were part of the state governments set up under President Lincoln's proclamation. Thereupon on March 16, 1867, over the veto of President Johnson, Congress passed a law reciting "no legal state government or adequate protection of life or property now exists in the rebel states of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas", and setting aside the state governments organized under Lincoln's amnesty.

The Fourteenth Amendment was thereupon ratified by the Carpetbag government of Georgia, North Carolina and South Carolina, which added to those of other states amounted to three-fourths, completing the necessary number of states to effect the ratification. The binding and conclusive effect of those states which had voted to reject the amendment was thus effaced by setting aside the governments themselves, thus treating the action rejecting the amendments as a nullity.

There was no serious question about the adoption of the Thirteenth Amendment abolishing slavery, although New Jersey having previously rejected the amendment undertook to ratify the amendment, but this occurred after the adoption of the amendment by three-fourths of the states and Secretary Seward in his proclamation did not mention New Jersey as one of the ratifying states. Documentary History of the Constitution, Vol. 2, page 636.

The Fourteenth Amendment was first proclaimed as adopted on July 20, 1868. There were then 37 states so that 28 states were necessary for adoption. Action was taken ratifying the Constitution by 25 states which did not undertake to reverse their position. Two states, Ohio and New Jersey, had ratified and afterwards rejected the amendment. North Carolina and South Carolina ratified through their *new* governments after having rejected the amendments under their former government. It appears from the Documentary History of the Constitution, Vol. 2, page 893, that Secretary Seward called attention to the fact that New Jersey and Ohio had tried to withdraw their ratifications and that six of the Southern states by newly constituted and newly established bodies avowing themselves to be and acting as the legislatures respectively of those states had ratified the amendment. It was by him "deemed a matter of doubt and uncertainty" whether the later resolutions of Ohio and New Jersey were

"not irregular and invalid and therefore ineffectual for withdrawing the consent of the said two states",

but notwithstanding this doubt he stated in his proclamation—

"and WHEREAS, the 23 states first thereinafore named whose legislatures have ratified the said proposed amendment, and the 6 states next thereafter named as having ratified the said proposed amendment by newly constituted and established legislative bodies together constitute three-fourths of the whole number of states.

NOW THEREFORE BE IT KNOWN I *** do hereby certify that if the resolutions of the legislatures of Ohio and New Jersey ratifying the fore-said amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those states which purport to withdraw the consent of said states from such ratification then the aforesaid amendment has been ratified in the manner hereinbefore mentioned and so has become valid to all intents and purposes as a part of the Constitution of the United States."

The day after this proclamation was issued, Congress adopted a resolution reciting that the 29 states mentioned above had ratified the amendment and affirmed "that said Fourteenth article is hereby declared to be a part of the Constitution of the United States and it shall be duly promulgated as such by the Secretary of State." A week later, July 28, 1868, the Secretary of State issued a second proclamation, including also the State of New Jersey, which had withdrawn her former rejection and had later ratified the amendment. Doc. Hist. Con., Vol. II, page 893.

In the above congressional action, it would appear that Congress took the position that after a state had ratified an amendment, it had exhausted its power and could not thereafter reconsider the question and pass a resolution rejecting the amendment. There are no court decisions upon this point, but several of the writers upon constitutional amendments, such as Jameson and Burgess, have undertaken to construe the action of

Congress as a legislative precedent to the effect that an affirmative vote to ratify was binding upon the state and exhausted its power to further action upon that amendment, and then announced, non sequitur, that a negative action refusing to ratify although filed with the Secretary of State is not binding and conclusive, because, as they say, the state at any time might vote to ratify. This seems to us to fail to recognize what has now become the law of the land under the recent decision of this Court, to-wit, that the legislature in ratifying is not acting in a legislative capacity but is in effect acting as a constitutional convention. It appears to us that when the legislature, undertaking to consider the amendment, acts upon it either affirmatively or negatively and announces its decision to the Secretary of State, it has then cast its vote on behalf of the people of that state, and the vote so cast, whether affirmative or negative becomes the act of the people of the state. When that legislature adjourns, the power of the state with reference to that amendment has been fully exercised and exhausted.

When the vote so taken is not only a vote of the state not to ratify but is an affirmative vote to reject the amendment, the suggestion made by Jameson and others loses its force. The state has then definitely and affirmatively declared itself upon the amendment. Having so acted, its recorded vote is conclusive. Its legislature has no right to thereafter assume to act as a convention of the people to again vote upon the amend-

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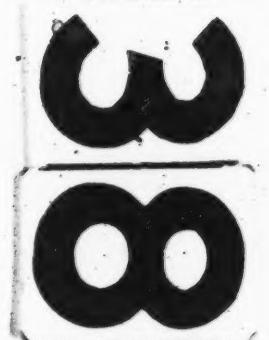
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ment which once has been definitely, positively and affirmatively rejected.

Because of the somewhat vacillating congressional action upon the Civil War amendments, some of the constitutional writers, led by Mr. Jameson, have developed a theory that a vote by a state to ratify is definitive and cannot thereafter be recalled while an affirmative vote to *reject* an amendment is not definitive but is subject to change at any time. The argument supporting this is that Article V of the Federal Constitution speaks only of ratification and is silent as to rejection of any proposed amendment. Logically the rule would apply just as well to an action taken by a state under a special convention as it would to an action taken by the state legislature but no one yet has had the temerity to suggest that if a state should call a convention to act upon a proposed amendment and that convention should definitely reject such amendment and then adjourn sine die, the state might thereafter call another convention and undo its action.

When an amendment is proposed by Congress, it is submitted to the people of the several states. The states then vote upon the proposal in the manner prescribed by Congress, either by a convention called for that purpose or by the legislature sitting in effect as a convention called for that purpose. It is a roll call of the state. The action of the convention or of the legislature determines the vote to be cast by that state. When that vote is cast, and the convention or legislature act-

ing as such a convention has adjourned, the action of the state would seem to be definitive. It is as unchangeable if it be an affirmative vote to reject as if it be an affirmative vote to ratify. In either case it is the vote of the state cast upon the proposal:

Prof. Orfield, in an article on Federal Amending Power, 25 Ill. Law Review 418, says:

"Conventions like legislatures are mere agents of the people. The ratifying process is equivalent to a roll call of the states."

Jameson, in his Treatise on Constitutional Conventions, 4th ed., §586:

"If an amendment to the federal constitution should be proposed by congress and submitted to the state conventions instead of to the legislatures, the powers and disabilities of the two classes of bodies in respect to the amendment would, it is conceived, be precisely the same."

In *Hawke v. Smith*, 253 U. S. 221, 40 S. Ct. 495, the Supreme Court says:

"Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblies representative of the people, which it was assumed would voice the will of the people."

In the same opinion the court says:

"Ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the states to a proposed amendment."

The exact question was under discussion in Congress in 1870, and what we believe to be the correct doctrine was stated by Senator Garrett Davis, of Kentucky, in such clear and convincing language that we quote at length from his speech of February 22, 1870, which is reported in the Congressional Record, 41st Congress, 2d session, page 1479, et seq.:

"But I will hasten on, Mr. President. Now, this is the main proposition to which I was coming. The same thing exactly is submitted to a State Legislature or to a convention of the State. The two tribunals of the State, whether it be a legislature or a convention, have precisely the same power. The convention would have as much as a Legislature; a Legislature as much power over the subject as a convention; and neither would have any more power over the subject of a proposed amendment than the other would have—not one iota. I challenge any Senator on this floor to point out to me a different and a larger power which a State acting by its Legislature would have over a proposed amendment than it would have, if it was acting upon the same amendment by its convention. The subjects would be the same, identically; the powers the same; the convention would have no more power than the Legislature; the Legislature no more than the convention, and neither less than the other.

"And here I take now my further position; that before each body the power would not only be of the same extent, but it would be exactly of the same continuance and duration. That, Mr. President, is an important proposition. It involves an important principle; it is the hinge upon which this question, in my judgment, turns. And what is the duration of the power? The Legislature acts until it has ratified; if it does not ratify the power con-

tinues until it acts to reject. *The power to reject is in all respects parallel to the power to ratify.* It is one of equal size, of equal force, of equal duration. It is the correlative, by necessary implication, of the power to ratify; and when the act of rejection has taken place the power, the whole power, is then exhausted—as much exhausted as it would have been by a ratification by the same Legislature.

"Let us apply this argument to a convention of a State called to consider a ratification *** Now, suppose that in each State you had a convention organized and that convention had met to consider, say, the fifteenth amendment; conventions in all the states had been summoned in obedience to the legislation or resolutions of Congress to pass upon the fifteenth amendment, whether it should be ratified or rejected; those conventions got together, charged, as they might have been, especially with this isolate, particular, and constitutional power of acting upon the proposed amendment, and passed upon it and rejected it, and the conventions then adjourned (*sine die*) and went home, could anything be more unsound, anything more monstrously absurd, than that such a convention might be reconvened for the purpose of withdrawing its action of rejection of the proposed amendment, and ratifying it? Sir, for any convention to have acted upon the subject in that form would have required special and particular language in the Constitution to authorize it.

"I agree with the honorable Senator from New York that this power is special; it is extraordinary; it does not appertain to the legislative powers of the States. So, too, the power to propose constitutional amendments does not appertain to the legislative powers of Congress. They are particular, extraordinary powers, made for a special and isolated case. They are to be construed strictly; and when

they are executed they are powers that are gone forever, because their function has been exercised.

"The honorable Senator's argument upon the first branch of his proposition I thought powerful and conclusive; but when he contended that this power of a State to act upon a proposed amendment to the Federal Constitution was a power to ratify, and imported no power to reject, I think he was widely from the true principle and widely from logic. How shall it be before a Legislature that has rejected it? How long shall it be an open question? Twenty years? Fifty years? How long? Where is there any principle or provision of the Constitution that would so protract the question before a State convention or State Legislature acting upon the subject of a proposed amendment? There is none. There is not a syllable of language from which such a power can be inferred. It does not exist. When the subject is submitted to a State for its action, it is but for one action. The action of acceptance is no more extensive than the action of rejection; it has no more validity or effect. The effect of either mode of action is to exhaust the power of the State over that proposed amendment, and it can never come before that State again in any form whatever unless it comes before it in the form of a new proposition to amend the Constitution."

The position taken by Senator Davis accords with the views of this Court as stated by Justice VanDeventer in *Rhode Island v. Palmer*, 253 U. S. 350, 40 S. Ct. 486, where the power to reject seems to be recognized as correlative with the power to ratify. The Court says:

"The referendum provision of state constitutions and statutes cannot be applied consistently with the

constitution of the United States in the ratification or rejection of amendments to it."

Under all parliamentary rules, when a question is submitted to the vote of an assembly or to the vote of the states, the right to vote against its adoption is inherent and is just as substantial as the right to vote in favor of its adoption. If the vote to adopt be irrevocable, then certainly the vote not to adopt is equally irrevocable. The provision in the Fifth Article of the Constitution of the United States must by implication give the same right to vote against the proposed amendment as to vote in favor thereof.

When the Kansas legislature of 1925 cast its affirmative vote to reject the amendment, it exhausted the power of the State unless the amendment is resubmitted by Congress.

WHENEVER MORE THAN ONE-FOURTH OF THE STATES VOTE AFFIRMATIVELY TO REJECT A PROPOSED AMENDMENT THE PROPOSAL IS DEFEATED. AT THE END OF 1925 THE PROPOSED AMENDMENT WAS DEFINITELY AND FINALLY REJECTED.

At the end of 1925, the vote of the states stood four for ratification and twenty-one for rejection. Six of the votes for rejection were merely negative votes defeating the proposal to ratify, but fifteen of the votes were affirmative votes *adopting resolutions to reject*. Even upon that basis, therefore, the vote stood four affirmative for ratification and fifteen affirmative for rejection.

(R. 13-18)

If the argument in our preceding subtitle be correct, then since more than one-fourth of the states had positively and definitely rejected the amendment, it was definitely defeated in 1925. By the end of 1926, the vote against ratification was even stronger. Twenty-six states at that time had definitely either rejected the amendment by adopting a resolution to that effect or had defeated a resolution to ratify. At that time, therefore, more than a majority of the states had rejected the amendment. Unless thereafter the states had the right to renege, the amendment was as dead as a door nail at the end of 1925, and the corpse was ready for burial at the end of 1926. This was a contemporaneous expression of disapproval by the people of a clear majority of the states of a proposal by Congress of 1924.

This question was discussed by Frank W. Grinnell, of the Boston bar, in an article published in the American Bar Association Journal, in July, 1934. A portion of his article is as follows:

"In the very recent unanimous opinion by Chief Justice Hughes in *U. S. v. Chambers and Gibson*, decided February 5, 1934, the court took 'judicial notice of the fact that the ratification of the twenty-first amendment which repealed the eighteenth amendment was consummated on December 5, 1935', and they cited the case of *Dillon v. Gloss*, 225 U. S. 368. December 5th was the date on which the thirty-sixth state voted to ratify.

"Since the constitution requires a vote of three-fourths of the several states to ratify an amendment, it requires only one state more than one-fourth to defeat ratification and it seems to follow as a

matter of common sense and orderly procedure from the decision just referred to that the rule must work both ways and that when thirteen states (one more than one-fourth of the forty-eight states) have voted not to ratify an amendment it is no longer pending, but is defeated *until Congress sees fit to resubmit it.* Otherwise, a state could change its mind in one direction after a final vote of the necessary number of states, but not in the other direction.

"In the case of the Child Control Amendment, not only thirteen but twenty-six states voted not to ratify. I submit that it was clearly defeated. If this is not so, states might be subjected to constant agitations over defeated amendments after the citizens considered them defeated and were off their guard.

"When an amendment is submitted by Congress, the process of ratification is really a debate among the several states. If it is true, as I believe it to be, that at this time the Child Control Amendment is no longer before the states, the action of those states which have attempted to ratify it during 1933 has no legal affect.

* * * * *

"If we are to have deliberative government in this country on such important matters as amendments to the Constitution of the United States, is it not essential that we should maintain the rules of orderly procedure similar to those in our legislatures under which, after a matter has been definitely defeated by the requisite majority, it cannot be considered again unless it is *resubmitted in the usual way—in this case by Congress.*"

We respectfully submit that the proposed amendment, having been previously definitely rejected by more than

one-fourth of the states, to-wit: twenty-six, could not properly be brought before the 1937 session of the legislature of Kansas for action.

THE PROPOSED AMENDMENT HAS LOST ITS POTENCY BY REASON OF OLD AGE.

There is nothing in Article V of the Constitution of the United States placing a limit upon the time within which the states shall ratify an amendment, but constitutional writers have recognized the necessity for some such rule. From the very nature of things, it would seem to be quite improper that an amendment proposed by Congress should hang in thin air for generations, awaiting ratification by the several states, or that no matter how inactive the states might be that that proposal should still be pending. One or two such proposals are now more than a hundred years old and have never been either ratified or affirmatively rejected. It would seem very strange if by some campaign new life could be put into these age old proposals and they be brought now to the states for their ratification. Judge Jameson, in his work on the Constitution, 4th Ed. §585, says:

"The better opinion would seem to be that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."

* * * * *

"We discuss this question here merely to emphasize the dangers involved in the Constitution as it stands, and to show the necessity of legislation to make those points upon which doubts may arise in the employment of the constitutional process for amending the fundamental law of the nation. *A constitutional statute of limitation, prescribing the time within which proposed amendments shall be adopted or be treated as waived, ought by all means to be passed.*" (All italics ours.)

The validity of a time limit is approved by this Court in *United States v. Chambers*, 291 U. S. 417, 54 S. C. 434.

We have then a congressional expression repeated three times to the effect that seven years is a reasonable time within which a proposed amendment should be ratified or rejected by the state. This limitation has been approved by the Supreme Court with the further statement that Article V does not contain any suggestion that an amendment once proposed is to be open to ratification for all time but that

"We do not find anything in the Article which suggests that an amendment, once proposed, is to be open to ratification for all time, or that ratification in some of the states may be separate from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are

to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period which, of course, ratification scattered through a long series of years would not do."

Dillon v. Gloss, 41 S. C. 510, 512.

And the court definitely approved the period fixed by Congress as reasonable time as follows:

"It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

With respect to the last suggestion the records show that the period within which constitutional amendments have been adopted, omitting the first ten, to be as follows:

Eleventh:	2 yrs. 4 mo.
Twelfth:	9 mos.
Thirteenth:	10 mos.
Fourteenth:	2 yrs., 1 mo.
Fifteenth:	1 yr., 1 mo.
Sixteenth:	3 yrs., 6 mos.
Seventeenth:	1 yr., 2 wks.
Eighteenth:	1 yr., 1 mo.
Nineteenth:	1 yr., 2 mos.
Twentieth:	11 mos.
Twenty-first:	9 mos. 2 wks.
AVERAGE TIME:	1 year, 6 months.

The proposed amendment under consideration shows a very definite adverse sentiment of the people of the country *at the time the amendment was proposed*. As we have above stated, by the fall of 1925, scarcely a year after the proposed amendment, it had been rejected by twenty-one states and ratified by only four. By 1926 there were twenty-six rejections. In 1927 one ratification and one rejection. It then fell into a long period of innocuous desuetude and was not ratified by any other state until a very aggressive campaign for its revival was started in 1933. With this hiatus of eight years, it can scarcely be said that the activity of 1933 is contemporaneous with the date of submission of 1924 and its definite rejection in 1925. The contemporaneous expression was definitely and definitively against ratification. The proposal lost its potency by old age, (if we apply the seven-year period prescribed by Congress in the three later amendments), long before the renewed attempted rejuvenation in 1933, and the action by Kansas in 1937.

We very respectfully submit that the amendment must be again proposed by Congress in order to now properly come before any of the states. For this reason, the amendment was not properly brought before the legislature of Kansas in 1937.

Jameson evidently believed that any such limitation would require a constitutional amendment. However, Congress acting under the same sentiment when it proposed the Eighteenth Amendment respecting alcoholic

beverages, inserted the limitation that it should be inoperative unless ratified "within seven years from the date of the submission hereof." A similar provision respecting the proposal and the time of ratification is contained in the submission for the Twentieth and the Twenty-first Amendments.

The power of Congress to fix such a limitation in a proposal to amend was challenged in *Dillon v. Gloss*, 256 U. S. 368, 41 S. C. 510. To this the court replied:

"These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson 'that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress'. That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article 5 is that the ratification must be within some reasonable time after the proposal."

"Of the power of Congress, keeping within reasonable limits, to fix a definite period for the rati-

fication we entertain no doubt. As a rule the Constitution speaks in general terms, leaving the Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power, to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

CONCLUSION.

We have shown the following:

First: The resolution, considered by the Kansas Senate in 1937, to ratify the proposed United States Constitution Amendment, did not pass because it did not receive a majority of the votes in that body: twenty senators voted in favor and twenty senators voted against the adoption of said resolution.

The Lieutenant Governor of Kansas, who cast the deciding vote, not having been elected to the senate and, therefore, not a member of the legislature, was not entitled to vote on the resolution even to decide a tie.

Second: When the Kansas legislature in 1925 adopted an affirmative resolution to reject the Child Labor proposed amendment, when proper notification of this action was filed with the Secretary of State and then adjourned

sine die, it had completed its action and Kansas had exhausted its power to again even consider the amendment.

The 1925 legislature completed its task as a convention representative of the people of Kansas. A subsequent legislature cannot assume to undo what a previous legislature, acting as a constitutional convention, has already done. After the action in 1925, the matter of the amendment was no longer before Kansas.

Third: Whenever more than one-fourth of the states vote affirmatively to reject a proposed amendment to the Constitution of the United States, the proposal is defeated. At the end of 1925 the proposed amendment was definitely and finally rejected. By the end of 1926, the vote against ratification was even stronger: twenty-six states had either rejected the amendment or defeated a resolution to ratify. This was a contemporaneous expression of disapproval by the people of the states of the proposal of the Congress in 1924.

Fourth: It would seem quite improper that an amendment proposed by the Congress should hang in thin air for generations. The Supreme Court has approved the thrice-repeated congressional expression to the effect that seven years is a reasonable time within which a proposed amendment should be ratified or rejected by the states.

An eight-year hiatus between the submission of the amendment in 1924, its definite rejection in 1925, and the activity for its ratification in 1933 can not be said to be a reasonable time. The proposal lost its potency by old age long before the attempted rejuvenation in 1933 and the action by Kansas in 1937.

The opinion of the Supreme Court of Kansas, should
be reversed.

Respectfully Submitted,

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A copy of the foregoing brief received this
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Solicitor General of the United States.





OCT 15 1938

CHARLES E. B.

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1938.

No. 7

ROLLA W. COLEMAN, W. A. BARRON,
CLAUDE C. BRADNEY, ET AL.,
PETITIONERS,

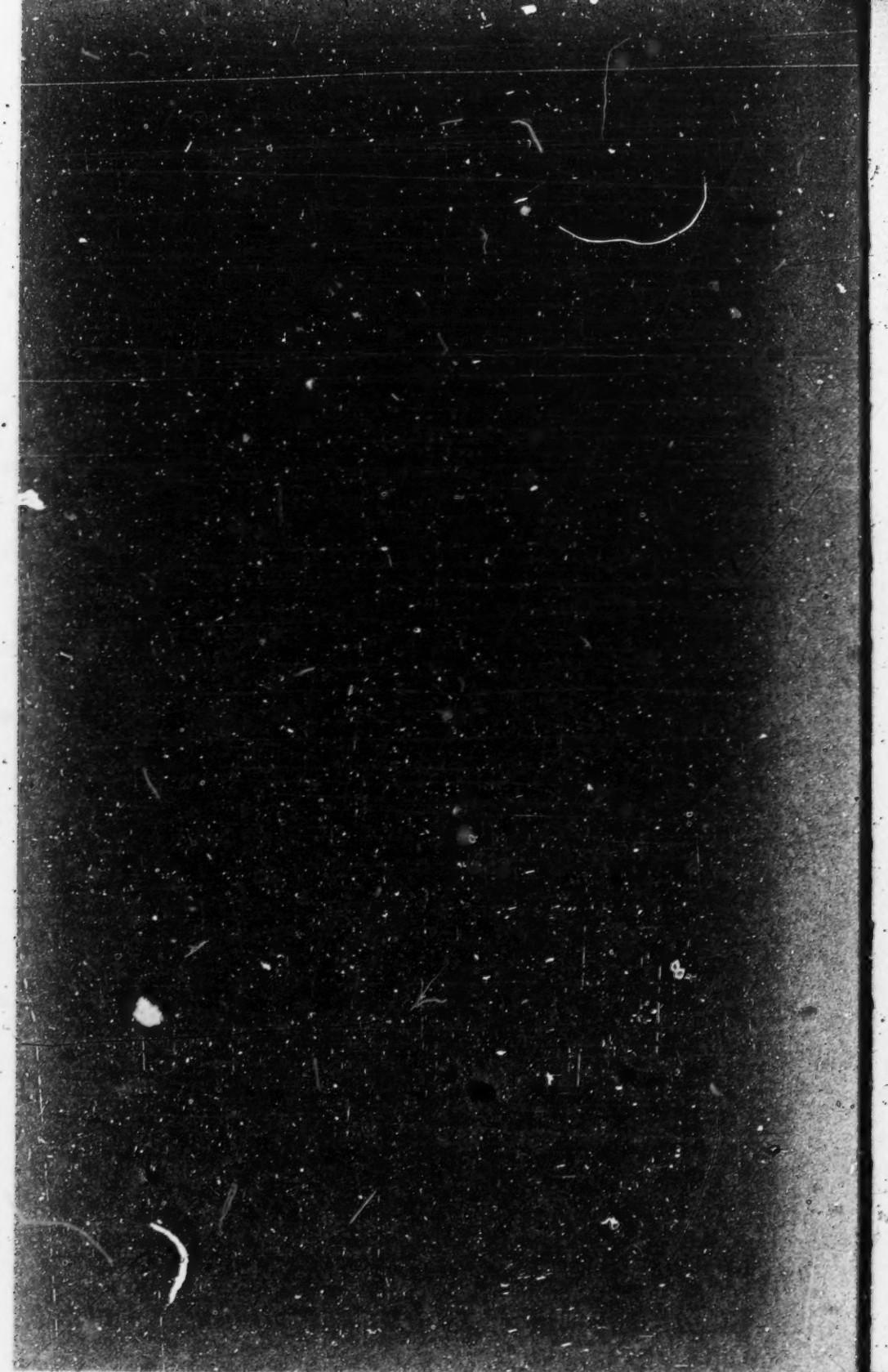
vs.

CLARENCE W. MILLER, AS SECRETARY OF THE
SENATE OF THE STATE OF KANSAS, ET AL.,
RESPONDENTS.

MEMORANDUM OF PETITIONERS IN REPLY
TO BRIEF OF SOLICITOR GENERAL.

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IN THE SUPREME COURT OF THE
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OCTOBER TERM, 1938.

No. 7

ROLLA W. COLEMAN, W. A. BARRON,
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vs.

CLARENCE W. MILLER, AS SECRETARY OF THE
SENATE OF THE STATE OF KANSAS, ET AL.,
RESPONDENTS.

REPLY TO BRIEF OF SOLICITOR GENERAL.

RATIFICATIONS ARE INVALID BY REASON OF LAPSE
OF TIME SINCE THE SUBMISSION OF THE
AMENDMENT.

In his brief at page 24, the Solicitor General suggests that the question of what is a reasonable time between submission and action by the legislature upon ratification is not justiciable, that since the Fifth Article of the Constitution does not fix any period of time in which ratification must take place, the question of limitation, if any, is left to congress, and therefore is a political question. He suggests that a limitation to this amendment was proposed in congress and by its refusal to set a

period, congress indicated that no limitation should be placed upon the time within which ratification might take place. We submit that if congress had inserted a period of limitation as it did in the Eighteenth, Nineteenth, and Twenty-first amendments, the court would be bound to accept that period unless, as a matter of law, it could say that the period fixed was unreasonably short or unreasonably long.

The Solicitor General seems to concede that "an amendment can not pend indefinitely" (br. 26). The Second Amendment which was proposed in 1789, dealing with the compensation of members of congress failed at that time and has never received the requisite majority of states. But in 1873 eighty-four years after its proposal the Ohio legislature adopted a resolution of ratification.

This court indicated that that proposed amendment is "outdated" in the case of *Dillon v. Gloss*, 41 S. C. 510, 256 U. S. 368, when it said:

" *** As ratification is but the expression of the approbation of the people and is to be effective when had in the three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which, of course, ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson 'that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and, that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted

upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion *it is quite untenable*. We conclude that the fair inference or implication from Article 5 is that the ratification must be within some reasonable time after the proposal." (Italics ours.)

According to the logic of the Solicitor General's suggestion, this second amendment, relating to the compensation of members of congress, still hangs suspended in the air because congress fixed no period of limitation; it is still an unsettled question, open to ratification by the several legislatures; it cannot die by lapse of time and the court cannot determine that a reasonable time has expired because, as he says, *the question is not justiciable*. This is quite repugnant to the statement above quoted from *Dillon v. Gloss*. If his contention be correct, there was no occasion for the discussion in *Dillon v. Gloss* of the question of whether or not seven years was reasonable, because that question is purely political; the court has no business to consider it. If his contention be correct, then congress might fix a period of fifty years for ratification, and, however absurd it might be as applied to the particular amendment, the court could not

say that it was an unreasonably long time. But if such an absurdly long period so fixed by congress is justiciable, then, of course the entire failure to fix any period is also justiciable.

This leads us to attempt to answer the question propounded by the Chief Justice during our argument, asking us to indicate what criteria might be used by the court in fixing a period of limitation.

We suggest:

- (1) A period of at least two years should be allowed so that every legislature throughout the country will have convened and had an opportunity to pass upon the proposed amendment.
- (2) Six years would not seem to be unreasonably long so that during that period every senator, as well as every congressman who voted for the proposal will have gone through an election and had an opportunity to explain to his constituents the reason for his vote for or against the proposal. This would be a period of public argument for and against the amendment.
- (3) Seven years has been used by congress as a reasonable period in submitting three separate proposed amendments and has been declared by this court to be a reasonable period. This is a legislative declaration.
- (4) One year, six months, and thirteen days is the average time used by the people in passing upon

amendments which have been ratified by congress since the first ten amendments.

- (5) Three years, six months, and twenty-five days is the longest time used in ratifying any amendment ever proposed.
- (6) The nature and extent of publicity and the activity of the public and of the legislatures of the several states in relation to any particular proposal should be taken into consideration.

This leads to the consideration of the facts surrounding the Child Labor Amendment.

It was proposed in January, 1924. On April 20, 1935, the Department of State released a summary of the records of the department showing the action taken on the proposed amendment by the respective legislatures and reported to the Department of State. (Tr. of Record, pp. 13-18.) This release was admitted as correct and is the basis for a chart attached to the brief for respondents in *Chandler v. Wise*, No. 14, and shown as Appendix A. From this chart it appears that in 1924 Arkansas ratified the amendment; Georgia, Louisiana, and North Carolina rejected it. In 1925, Arizona, California and Wisconsin ratified it; the following states rejected it: Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West

Virginia and Wyoming. In 1926 Kentucky and Virginia rejected it. In 1927, Montana which rejected it in 1925 ratified it and Maryland rejected it. In 1928, 1929, and 1930 no action was reported to the Department. In 1931 Colorado, which had in 1924 rejected the amendment, voted to ratify. In 1932 no action was reported. So that from the records of the Department, eight years after the proposal, only six states had ratified the amendment and thirty-eight states had rejected the amendment, with two changes leaving a net of thirty-six if changes be allowed.

The Solicitor General obtained additional information of action taken in the respective legislatures but not reported to the Department of State. That action is summarized in Appendix A to his brief. In that table the asterisks show the same ratifications as the Allen table. "Jp. 2" indicates that a resolution or bill for rejection had passed each house. According to the table, in 1924 such positive action was taken in one state; in 1925, in fifteen states; in 1926, in two states; in 1927, in one state, making a total of nineteen states in which the vote was to reject the amendment. In addition, to this, there were four states, marked "Rd. 2" which indicates that a resolution or bill for ratification was defeated in each house of the respective legislatures. In the year 1925, the states of Connecticut and Delaware acted, and in 1927 Pennsylvania defeated such a resolution, so that by the end of the year 1927, we have nineteen states which adopted a bill or resolution to reject and four states in which a resolution to ratify was defeated in each house,

or a total of twenty-three states, with only five ratifications at that time, and only one thereafter up to and including the end of 1932. The same table shows that by 1931 every state in the union, with the sole exception of Alabama, had had the proposal to amend under consideration, so that at the end of eight years, which is a longer period than has ever been fixed for ratification, and twice as long as the longest time used in ratifying any amendment, this proposed amendment had been under consideration throughout the whole country, with the single exception of Alabama, and had secured only six ratifications and had been in effect rejected by forty-one states.

Applying the above criteria which we have suggested to the Child Labor Amendment, together with this history of consideration, and rejection if occurs to us that there should be no hesitation in declarraing that an unreasonable time had elapsed in 1932, before the new drive was made to secure ratification. This was an expression of the will of the people contemporaneous with the time of the proposal of congress in 1924. It seems to us untenable to contend that that expression could now be set aside by the expression of the people taken at a much more remote period beginning with 1933, nine years after the proposal, and extending to 1937, and still eight short of the requisite thirty-six. More refusals than ratifications have been cast every year since 1933. The people should be given surcease from these annual drives to break down the expressed will of opposition by a decree that a reasonable time has been consumed.

And so the proposed amendment was dead. Dead as Old Marley. The vote was cast overwhelmingly against the proposal. It was a deliberate, well-considered vote which in any parliamentary proceeding would be regarded as decisive. It represented a determined resistance on the part of the people against placing the labor of their children in the hands of a remote congress instead of leaving it under the local control of the states. The matter would never have been revived except through a re-submission by congress were it not for that pernicious doctrine born in reconstruction days that an "aye" is an eternal aye, unchangeable as the law of the Medes and the Persians, but that a "no" is always a negative pregnant with a possible "yes" which can be brought forth through whispered wooings or swift and strong attack. Under this doctrine, the people of any particular state, resting assured that their positive repudiation settled the matter, might be made the object of concentrated effort until, their resistance worn down, a final and reluctant consent could be recorded. In the meantime every affirmative vote is put away in cold storage to await the addition, one by one, whenever and however an affirmative vote can be obtained.

In the last five years, including 1938, eight additional affirmative votes have been obtained. Another eight are still needed. Another five years will bring us to 1943. The final victory, if it should be then attained, would date twenty years from the time the amendment was proposed by congress—a whole generation. This will not

be contemporaneous with the submission and could scarcely be said to be just another step in a single endeavor.

CONCEPT OF REJECTION.

The Solicitor General at page 7 says: "The concept of rejection is extra-constitutional. If that concept is introduced as a constitutional limitation, the effect will be confusion and uncertainty." On page 11 he suggests that "If the concept of rejection is once imported as a constitutional limitation on further action by a legislature, it is necessary to define the concept."

A concept of rejection is inherent in Article V. A proposal is submitted to the legislatures for a vote. It does not seem reasonable that only the ayes should be recorded. As stated by Senator Smith (see our Brief, pages 27, 28):

"The power to reject is in all respects parallel to the power to ratify." ***

"The action of acceptance is no more extensive than the action of rejection; it has no more validity or effect. The effect of either mode of action is to exhaust the power of the State over that proposed amendment, and it can never come before that State again in any form whatever unless it comes before it in the form of a new proposition to amend the Constitution."

The power to reject is inferentially recognized by this Court in *Rhode Island v. Palmer*, 253 U. S. 350, 40 S. C. 486, wherein it is stated:

"The referendum provision of state constitutions and statutes can not be applied consistently with the

constitution of the United States in the ratification or rejection of amendments to it."

The Solicitor General is disturbed about the difficulty in arriving at a definition of the term "rejected". (His brief, 12.) We need indulge in no refinement of definition here because in the case at bar there can be no doubt about the action taken by sixteen states (more than one-fourth of all the states), each of which adopted a resolution to reject the amendment and sent its vote for record to the Department of State. At the end of seven years the vote still stood, sixteen to reject, six for ratification, (ten not voting) and sixteen states expressing their dissent in a less positive way.

SHOULD ACTION BE TAKEN BY JOINT SESSION OF THE TWO HOUSES?

Mr. Justice Black asked the Solicitor General during his oral argument whether in the election of United States senators the legislatures of the several states acted in joint session or separately. It is our recollection that the election of United States senators was in joint session and not in separate sessions. The inference may be that in considering the ratification of a proposed amendment, the legislatures should act in joint session. If that be true, then the Kansas legislature did not act properly and the action in the two separate houses is void. It can hardly be said that the separate action of the two houses would necessarily be the same as the action of a joint session, because the debate might change the vote.

We understand that generally if not always in considering the proposed amendments the legislatures of the respective states have acted in separate houses, as was done in Kansas and Kentucky.

THE MEANING OF THE WORD "LEGISLATURE."

The Solicitor General in oral argument stated that the term "legislature" is used many times in the federal Constitution and that it could not in that document mean one thing in one place and another thing in another place. This court has held quite to the contrary. In *Smiley v. Holm*, 285 U. S. 355, 52 S. Ct. 397 (l. c. 399), reference is made especially to the definition of "legislature" as stated in *Hawke v. Smith*, 253 U. S. 221, and the Chief Justice then says the term was not one

"of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people. The question here is not with respect to the 'body' as thus described but as to the function to be performed. The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. *** Wherever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view. The primary question now before the Court is whether the function contemplated by article 1, §4, is that of making laws."

Incidentally, the Kansas Constitution says:

"Art. 2, Sec. 1, The legislative power of this state shall be vested in a house of representatives and senate,"

and then defines the senate and house. (See our Brief 4.)

CONCURRENT RESOLUTION.

The Solicitor General in oral argument referred to some Kansas decision respecting concurrent resolutions and the reapportionment or redistricting of the states for election of United States senators and congressmen. We believe that the Solicitor General was referring to the above case of *Smiley v. Holm*, which came up to this court not from Kansas, but from Minnesota. That case did not involve a concurrent resolution but involved redistricting a state and the primary question as to whether the function contemplated by Article I, Sec. 4 of the federal Constitution is that of making laws. It was held that it did embrace authority to provide a complete code for congressional elections. It also decided that whether the governor of the state, through veto power, should have a part in making the state laws is a matter of state policy.

It is possible, however, that the Solicitor General had in mind the case of *State v. Knapp*, 102 Kan. 701, wherein the Supreme Court of the state held that an act erroneously entitled "House Concurrent Resolution" "where it has received the treatment of such a bill or joint resolution and has every characteristic thereof except that it describes itself as a concurrent resolution, and contains

the words, 'Be it resolved by the house of representatives of the State of Kansas, the senate concurring therein', instead of the constitutional formula for an enacting clause, 'Be it enacted by the legislature of the State of Kansas' may be regarded as a law." This resolution was approved by the governor, the vote of the members was recorded, and it was published in the statute books. Even under this state of facts, two of the justices filed vigorous dissenting opinions, which were joined in by a third justice.

We do not see that this has any bearing upon the case at bar.

The learned brief and able argument of the Solicitor General have not convinced us that we are wrong. We still believe that the order of this court should be to remand the case with a direction to enter judgment for the petitioners on the following grounds:

1. The lieutenant-governor not being a member of the legislature was not entitled to vote under Article 5 of the Federal Constitution, and the resolution therefore did not pass.
2. Kansas having in 1925 passed a positive resolution to reject the amendment and said vote having been recorded with the Department of State, and the legislature so acting having adjourned sine die, the Kansas legislature of 1937 had no power to act upon the proposed amendment unless and until it should be resubmitted by congress.

3. More than one-fourth of the states having adopted a positive resolution to reject the amendment and said vote having been recorded with the Department of State as early as 1926, the proposal to amend was defeated and was not open to further consideration by any of the states, and the resolution to ratify was therefore improperly brought before the legislature in 1937.
4. The proposal to amend the constitution having been submitted by Congress in 1924, more than seven years having expired in 1932, the proposal having been considered and acted upon in all of the states of the union in one form or another with the exception of one state, and the vote upon said amendment at that time standing only six for ratification and a repudiation in one form or another by all the other states, it appears that a full consideration of the proposal had been had and that a reasonable time had elapsed and the

proposition was thereafter not open to consideration by any of the states.

Respectfully submitted,

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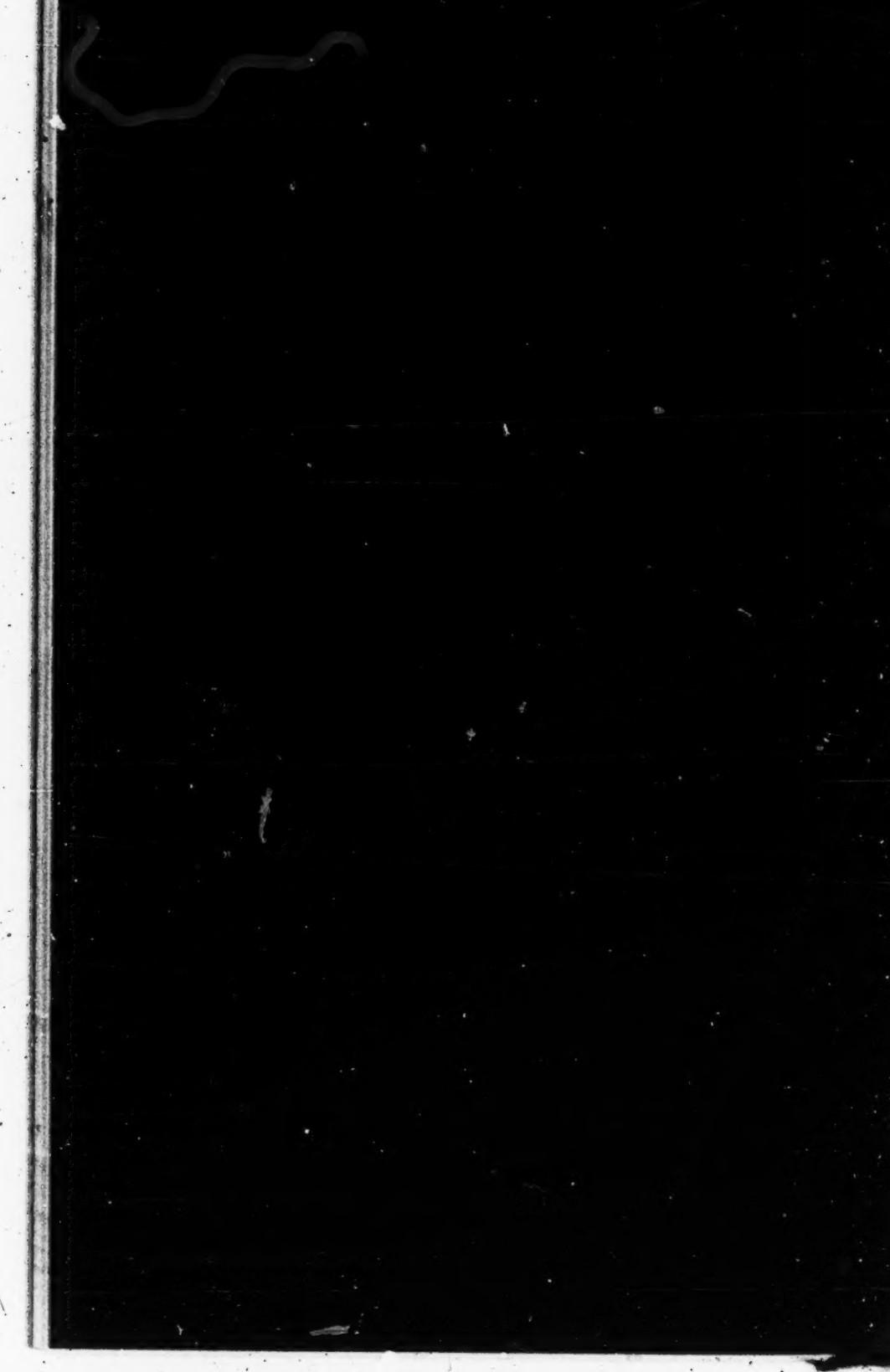
No. 7

MOLLA W. COLEMAN, et al., Petitioners
v. CLAUDE L. MURKIN, et al., Respondents.

CLAUDE L. MURKIN, as SECRETARY OF STATE
FOR THE STATE OF KANSAS, ET AL., Petitioners
v. MOLLA W. COLEMAN, et al., Respondents.

NOTICE ON JUDGMENT

ROBERT STONE,
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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1938.

No. 796.

ROLLA W. COLEMAN, W. A. BARRON,
CLAUDE C. BRADNEY, ET AL.,
PETITIONERS,

vs.

CLARENCE W. MILLER, AS SECRETARY OF THE
SENATE OF THE STATE OF KANSAS, ET AL.,
RESPONDENTS.

MEMORANDUM BRIEF ON JURISDICTION.

Mr. Justice Frankfurter on the bench asked me to reconcile this case with *Fairchild v. Hughes*. We regret our inability to do so in oral argument, but the case of *Leser v. Garnett*, decided the same day and reported in the same volume with *Fairchild v. Hughes*, is such a complete answer that it seems as though I must have misunderstood the purport of the question.

The Kansas case was started as an original action in the Supreme Court of the state by thirty-one senators and three members of the House then in session. In

addition to that, the Senate passed a resolution instructing the Attorney-General to enter appearance for the state of Kansas in the suit, and under a court order that was done. The question of jurisdiction was raised by the state court and the Supreme Court of Kansas decided that it had jurisdiction. This decision brings it squarely within *Leser v. Garnett* so far as jurisdiction of the parties is concerned and the right of the parties to bring suit. But our case is much stronger than *Leser v. Garnett* for the following reasons. In the *Leser* case the plaintiffs were simply citizens and voters. In the Kansas case the plaintiffs have a peculiar interest in the law suit aside from the fact that they are citizens and voters. They are members of the legislature which passed upon the resolution to ratify. They have a peculiar interest in having their action made effectual. By casting twenty votes against the resolution, they defeated it, unless the Lieutenant Governor had a right to vote. Two of their number voted on the original resolution in 1925, rejecting it. Those two at least had an interest in making that action of rejection effectual. In addition to this, the state is a party to the litigation and all of the people of the state are interested, and this was done under the instructions of the plaintiffs in this case. So far as the right of the parties to maintain the suit in the state court is concerned, it is definitely settled and that brings us squarely within the rule of *Leser v. Garnett*. This is so evident that it seems I must have misunderstood the

real purport of the question. Perhaps the question intended to include the argument made by the Solicitor General on Tuesday, when he suggested that the action was premature.

As we have already argued in our brief the question is justiciable because the deliberative action of the legislature was at an end and only the ministerial act of certification remained. The question is not whether the legislature should as a political measure ratify the amendment or reject it. The question pure and simple is whether or not the action already taken by the legislature is valid. This controversy involves the construction of Art. 5 of the Constitution; the meaning of the word "legislature". It involves the question of whether or not a rejection once made is binding or can be rescinded by a subsequent legislature. It involves the question of whether or not more than one-fourth of the legislatures of the respective states having rejected an amendment by definite and positive action and not mere inaction, the amendment is thereby defeated. It involves the question of whether or not Art. 5 implies that an amendment proposed by the Congress shall be acted upon presently or may be delayed for a century or more before action is taken; whether under all the circumstances in this case the proposal to amend has not lapsed by reason of the expiration of a reasonable time. Those questions are all judicial questions and not legislative or political questions. They do not involve in any way the deliberative

machinery of the government, but they review action of the legislature already taken. That a controversy has arisen is evident. If it follows and does not interrupt the legislative action or the action of a deliberative assembly, but only seeks to pass upon the validity of said action; then it is not political but judicial. While the action of the legislature in passing upon a proposed amendment is not strictly legislative, still it partakes of the same character and a definition of judicial as compared with legislative action would seem to be applicable to the situation at bar. This court, by Justice Brewer, many years ago defined and distinguished legislative from judicial action as follows:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable;—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future; —that is a legislative act."

Interstate Commerce Comm. v. Cincinnati, N. O. & T. P. R. R. Co., 187 U. S. 479, 42 L. ed. 243.

We suggest that the same definition and differentiation is applicable to the case at bar. The deliberation of the legislature in determining whether or not the proposed amendment shall be ratified is a semi-legislative function. But an inquiry as to whether the thing done was a ratification, was validly done, or whether the matter could be properly considered at the time, is a judicial function.

The controversy is justiciable.

Respectfully submitted,

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**IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1938.**

No. **96.**

7

ROLLA W. COLEMAN, W. A. BARRON,
CLAUDE C. BRADNEY, ET AL.,
PETITIONERS,

vs.
CLARENCE W. MILLER, AS SECRETARY OF
THE SENATE OF THE STATE OF
KANSAS, ET AL.,
RESPONDENTS.

BRIEF ON BEHALF OF RESPONDENTS.

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**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1938.

No. 796.

**ROLLA W. COLEMAN, W. A. BARRON,
CLAUDE C. BRADNEY, ET AL.,
PETITIONERS,**

vs.

**CLARENCE W. MILLER, AS SECRETARY OF
THE SENATE OF THE STATE OF
KANSAS, ET AL.,
RESPONDENTS.**

BRIEF ON BEHALF OF RESPONDENTS.

This case is here on Writ of Certiorari to the Supreme Court of the State of Kansas, which court held that the action of the Kansas Legislature in ratifying the proposed Child Labor Amendment was regular. The opinion of the Court below is reported in *Coleman v. Miller*, 146 Kansas at page 390. As stated by the petitioners, there is no material dispute as to the facts.

The petitioners in this appeal have asserted four specifications of error.

1. The resolution ratifying the proposed child labor amendment was not adopted by the Kansas Legislature, for the reason that the Lieutenant Governor had no right to vote on the resolution. The vote of

the Senate, all members being present, was evenly divided, and the Lieutenant Governor gave the casting vote.

2. The Legislature of the State of Kansas was without power to adopt a resolution ratifying the proposed child labor amendment, for the reason that in 1925 the legislature of the State of Kansas adopted an affirmative resolution rejecting this amendment, filed notification thereof with the secretary of state of the United States, and adjourned sine die.

3. The proposed child Labor Amendment was withdrawn from consideration by the States for the reason that by the end of 1927 the legislatures of more than one-fourth of the States, acting affirmatively, had voted to reject said proposed amendment.

4. The proposed child labor amendment has lost its potency by reason of old age. More than a reasonable length of time has expired since the child labor amendment was proposed by Congress.

The Supreme Court of Kansas in its opinion below, reported in the case of *Coleman v. Miller*, 146 Kan. 390, held that the resolution ratifying the proposed amendment was regularly adopted by the Kansas legislature; that the rejection by the Kansas legislature of 1925 was ineffectual and of no consequence; and that the proposed Child Labor Amendment to the Constitution of the United States retains its validity and vitality as a proposed amendment.

The Court of Appeals of Kentucky in *Wise v. Chandler, et al.*, 108 S. W. (2d.) 1024, held that the rejection by the Legislature of a proposed amendment to the Constitution was binding on the state and it could not recon-

sider the action; and that the proposed Child Labor Amendment was impotent by reason of age.

The solution of the question is in the construction of Article 5 of the Constitution and so far as pertinent it is as follows:

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, *** which *** shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress. *** "

This court has construed this article as follows: "That two-thirds of both houses means two-thirds of the members present, assuming the presence of a quorum, and that the adoption of the resolution by the Congress sufficiently shows that the proposal was deemed necessary." (National Prohibition Cases, 253 U. S. 350.) That the approval of the president is not necessary. (Hollingsworth v. Virginia, 3 Dall. 378, 1 L. Ed. 644.) That when Congress submits an amendment to a state legislature it cannot be ratified by conventions in the states. (U. S. v. Sprague, 282 U. S. 716.) That the power of the state legislature to ratify a proposed amendment to the federal constitution has its origin in the federal constitution; and it is illegal for a state to require a referendum on a constitutional amendment (Hawke v. Smith, 253 U. S. 221); that the approval of the governer of the state is not necessary (Smiley v. Holm, 285 U. S. 355); that the ratification must be within some reasonable time

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after the proposal and that the Congress has the power within reasonable limits to fix the period for ratification (*Dillon v. Gloss*, 256 U. S. 368); that there is no implied limitation upon the amending power (*Leser v. Garnett*, 258 U. S. 130); that official notice to the secretary of state, duly authenticated, that the state has ratified the proposed amendment is conclusive upon him and the certified proclamation of the Secretary of State that the proposed amendment has been regularly ratified is conclusive upon the courts. (*Leser v. Garnett*, *supra*.)

The effect of the affirmative rejection of a proposed amendment by a state; and the length of time that may be considered reasonable for a proposed amendment to retain its potency, in the absence of a limitation fixed by Congress, has not been determined by this court.

ARGUMENT.

I.

The petitioners contend that the resolution ratifying the proposed amendment did not pass the legislature of Kansas because the lieutenant governor cast the deciding vote. This question was presented to the Supreme Court of the State of Kansas and the opinion of that court, set out at pages 34 to 49 in the Record, determined the issue. It held that the lieutenant governor had the right, under the Kansas Constitution, to vote on a concurrent resolution as a member of the senate; but he does not have the right to vote on a bill or joint resolution as defined in the constitution of the State of Kansas. We think the rule that the Federal Courts are bound to

follow the decision of the highest courts of the state upon questions relating to the construction of the state constitution settles this question. (Green v. Frazier, 253 U. S. 233, and cases there cited; 25 C. J. 832.) This rule, we think, is especially applicable to the question here under consideration for the reason that this court has held that it is not necessary for the governor of a state to approve acts of the legislature under the authority of the Federal Constitution. (Smiley v. Holm, 285 U. S. 355, *supra*.) This is the precise distinction made by the Supreme Court of the State of Kansas in holding a concurrent resolution to be an expression of assent, and not "a bill or joint resolution which requires the approval of the governor."

Those issues involved the constitution; and the application of the statutes and constitution of the State. As to them, the judgment of its highest court is conclusive.

Senn v. Tile Layers Protective Union, 301 U. S. 468, 81 L. Ed. 1229.

See also:

Louisville Gas Co. v. Coleman, 277 U. S. 32, 72 L. Ed. 770.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158.
Georgia Electric Company v. Decatur, 295 U. S. 165, 79 L. Ed. 1365.

Guaranty Trust Co. v. Blodgett, 287 U. S. 509, 77 L. Ed. 463.

Anglo-Chilean Nitrate v. Alabama, 288 U. S. 218, 77 L. Ed. 710.

Hartford Accident Co. v. Nelson, 291 U. S. 352, 78 L. Ed. 840.

The validity of the legislative proceedings in the State of Kansas having been passed upon and approved by the Supreme Court of the State of Kansas, the same is conclusive upon this court and is no longer an open question. We shall not argue it further.

II.

The petitioners contend that the resolution adopted by the Kansas legislature of 1925 affirmatively rejecting the proposed amendment, and notifying the Secretary of State of the United States thereof precluded subsequent action on the part of the State of Kansas. The resolution adopted by the Kansas legislature in 1925 and filed with the secretary of state, among other things, provided that the "said proposed amendment to the constitution of the United States of America be and the same is hereby rejected by the legislature of the state of Kansas." (R. 4)

The Article of the Constitution under consideration provides that the proposed amendment shall become a part of the Constitution "when ratified by the legislatures of three-fourths of the several States." This court has determined that the power of the State Legislatures to ratify is derived from the Federal Constitution. The States act only under the authority there conferred. They can take no affirmative action except to ratify. They may refuse to ratify, which is equivalent to no action. The resolution passed by the legislature of the State of Kansas in 1925 is without effect on the proposed amendment because the Federal Constitution does not give it

the power affirmatively to reject. Such action must be construed as a refusal to ratify.

Wayne B. Wheeler of Columbus, Ohio published an article in 20 Case and Comment, page 548. He quotes from Chief Justice Marshall in *Fletcher v. Peck*, 3 L. Ed. 162, as follows:

"The principle is asserted, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under the law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power."

and concludes:

"The underlying principle in this case is that where the result of the vote is negative, it is the same as though no action had been taken. If it is affirmative, it exhausts power under the right to vote, and is final. Thus, where a vote has once been taken with an affirmative result, the power under the act is exhausted, and the result cannot be rescinded by a subsequent vote; but until an affirmative action is taken the power to have another vote is not exhausted."

In Yale Law Journal, Volume 30, page 133, W. F. Todd writing on this question said:

"On the other hand, it is perhaps clear that a state legislature has a continuing power of ratification until an amendment is adopted, or until such a long period has elapsed that a sort of statute of limitations may be said to have run against any power to ratify the proposal. It may be remembered

that the power in the state legislature is one derived from the federal Constitution, and is a power to ratify, not a power to reject." (p. 347.)

To our mind the resolution of 1925 by the legislature of the State of Kansas rejecting the proposed amendment was beyond the power of the Legislature and its action, except as it may be construed as a refusal to ratify, was a nullity. It has no effective place in the files of the Secretary of State. The reasoning in the opinion of the Supreme Court of Kansas, and the authorities there cited, seem conclusive upon this point. This court has quoted approvingly in *Dillon v. Gloss*, supra, from Judge Jameson, and on this question Judge Jameson said:

"The language of the constitution is, that amendments proposed by congress, in the mode prescribed, 'shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states,' etc. By this language is conferred upon the states, by the national constitution, a special power; it is not a power belonging to them originally by virtue of rights reserved or otherwise. When exercised, as contemplated by the constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be nullity. But, until so exercised, the power undoubtedly, for a reasonable time at least, remains." (Jameson on Constitutional Conventions, sec. 579.)

The soundness of the court's reasoning in the case of *Coleman v. Miller*, supra, together with the set of authorities cited therein, justifies the respondents in adopting much of the argument therein used. In addition to the

arguments advanced by the courts and text writers as above set out, the state believes that an even stronger argument leading to the same result may be advanced.

"For the purpose of a treatise on the constitutional law of the United States as it exists today, it is sufficient to describe the constitution as a legal instrument distributing governmental powers between the federal and state governments, according to the general principle that the powers granted the federal government are specified, expressly or by implication, and that the remainder of the possible governmental powers not delegated to the United States by the constitution, nor prohibited by it to the states are reserved to the states respectively, or to the people." (Tenth Amendment.)

Willoughby on Constitution of United States, 2d Ed. Vol. 1, p. 76.

It is elementary that a proposal from Congress to amend the Constitution of the general government is nothing more than a request from the general government, directed to each of the states, requesting the surrender of a portion of their possible governmental powers. Until such time as three-fourths of the states acced to that request, that portion of their possible governmental powers sought by Congress remains a portion of their sovereignty. While that sovereign power remains in the states, it is subjected to the control and exercise of one body—the state legislature. One legislature, while acting within its sovereign power, cannot take any action which will bind the hands of any succeeding Legislature. We contend that the rejection by the legislature of the State of Kansas in 1925 of the proposed amendment, had no more effect on succeeding legislatures than

if the proposal to amend had never been before the legislative body. Once, however, a legislature has ratified a proposed amendment, then that state has effectively surrendered a portion of its sovereign power, and no succeeding legislature may recapture that power when it has been delegated to the general government. After delegation through ratification, that possible governmental power is no longer a matter of state sovereignty; it then becomes in the nature of a contract with the general government and with the government of the forty-seven other states, the terms being that if three-fourths of the states surrender the same possible governmental power, then such power in the future can be exercised by the general government.

It is true that if three-fourths of the states fail to delegate such possible governmental power to the general government, the states which have ratified the proposed amendment continue to possess such power, but that authority remains because of non-ratification by a sufficient number of States. It depends upon the actions or nonactions of other sovereign state governments. The fact that more than one-fourth of the other states have at this time voted to reject the proposed amendment does not of itself extinguish the proposed amendment; for each of these several states may, in the exercise of their sovereign legislative powers, change that vote at the next session of the legislature. The hands of the succeeding legislatures are not tied by any failure or refusal to ratify. The succeeding legislatures, in the absence of ratification, have sovereign control over that

possible governmental function. They may legislate in the exercise of that function with a hope of accomplishing the ends desired without surrendering that power to the general government. The state may find that its local legislature is not effective to accomplish the end desired and now may be willing to surrender that governmental power to the general government. As above set out, the hands of succeeding legislatures are not tied by any previous refusal; and it may be that at the next session more than three-fourths of the states will expressly ratify the proposed amendment.

III.

The petitioners next contend that the proposed amendment has been defeated because more than one-fourth of the States have voted affirmatively to reject the proposed amendment.

Pétitioners give no authority for this contention other than quoting from an article in the American Bar Association Journal for July, 1934. The author of such article reasons that the rule permitting States to ratify should work both ways; that if, States have the power to ratify they should have the power to defeat a proposed amendment and cause its withdrawal from further consideration. The answer to this is that Article 5 gives the States no such power. The State has but one power and that is to ratify.

Suppose within two years after submission the Eighteenth Amendment had been rejected by more than one-fourth of the States, voting affirmatively; and then

within the seven-year prescribed period been ratified by three-fourths of the States. It seems inconceivable that the action of the States in affirmatively rejecting could defeat the action of Congress in submitting the proposed amendment and placing a seven-year limitation on its ratification. Congress has the right to propose amendments when it deems them necessary. It has the right to fix a reasonable limitation upon the period within which such proposed amendments shall be ratified. Such proposed amendments receive their vitality from Congress and cannot be extinguished by the States. No implication in Article Five gives the States any right to extinguish a proposed amendment.

IV.

It is contended by the petitioners that the proposed amendment has lost its potency by reason of age. This court in *Dillon v. Gloss*, *supra*, said:

"It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What, then, is the reasonable inference or implication? Is it that ratification may be had at any time, as within a few years, a century, or even a longer period; or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the Federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question.

"The proposal for the 18th Amendment is the first in which a definite period for ratification was fixed. Theretofore twenty-one amendments had been pro-

posed by Congress and seventeen of these had been ratified by the legislatures of three-fourths of the states,—some within a single year after their proposal and all within four years. Each of the remaining four had been ratified in some of the states, but not in a sufficient number. Eighty years after the partial ratification of one an effort was made to complete its ratification, and the legislature of Ohio passed a joint resolution to that end, after which the effort was abandoned. Two, after ratification in one less than the required number of states, had lain dormant for a century. The other, proposed March 2, 1861, declared: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any state, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state." Its principal purpose was to protect slavery and at the time of its proposal and practical ratification it was a subject of absorbing interest, but after the adoption of the 13th Amendment it was generally forgotten. Whether an amendment proposed without fixing any time for ratification, and which after favorable action in less than the required number of states had lain dormant for many years, could be resurrected and its ratification completed, had been mooted on several occasions, but was still an open question."

The practical construction given to Article 5 by the States seems to be that ratification may be given when the State feels that ratification is deemed necessary.

Again quoting from Dillon v. Gloss, *supra*:

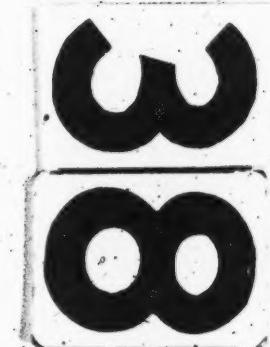
"We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years, and yet be effective. We

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do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the article lead to the conclusion expressed by Judge Jameson 'that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from article 5 is that the ratification

must be within some reasonable time after the proposal."

As we construe this opinion the court holds that proposal and ratification are successive steps in a single endeavor and that they are not to be widely separated in time; that amendments spring from necessity, and ratification is by the approbation of the people. Consequently the people who deemed the amendment necessary should participate in the ratification. Ratification establishes that the people deem the amendment necessary. It is therefore logical to conclude that ratification should be brought about by those who felt the necessity of a change in the fundamental law and that ratification should not be left to future generations who had long since forgotten the necessity. It is quite clear from the record that the necessity of an amendment to the constitution to prevent child labor had agitated the minds of the people for many years prior to the proposed amendment to the constitution by the congress. The congress attempted to solve this perplexing problem under the Commerce clause of the Constitution in 1918, six years prior to the passage of the proposed amendment. The action of the congress was held void by this court in Hammer v. Dagenhart, 247 U. S. 251. Congress then turned to the taxing power and attempted to destroy the evil of child labor under that section of the constitution. This action was declared unconstitutional in 1922 in Bailey v. Drexel Furniture Company, 259 U. S. 20.

It evidently appeared to the Congress at that time that the prevention of child labor could be accomplished

only through an amendment to the constitution. This amendment passed the congress in 1924 and was submitted to the legislatures of the several states. It was constantly before the legislatures of the States from 1924 to 1937. In 1924 Arkansas ratified. Georgia and North Carolina rejected. In 1925 Arizona and California ratified and Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Minnesota, Mississippi, Missouri, New Hampshire, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont and Wisconsin either rejected or refused to ratify. In 1926 Florida, Kentucky and Virginia rejected. In 1927 Montana ratified and Maryland rejected. In 1931 Colorado ratified. In 1933 Illinois, Iowa, Maine, Michigan, Minnesota, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon and Washington ratified and Massachusetts rejected. In 1934 Pennsylvania and West Virginia ratified and South Dakota rejected. In 1935 Idaho, Indiana, Utah and Wyoming ratified. In 1937 Kansas ratified and Kentucky rejected. (R. 14-18.)

From this record it is clear that from 1918 until 1937 this question has been before the people constantly; and that the prevention of child labor is still deemed necessary by a large portion of the population of the United States. In only one legislative year, 1929, did the States fail to act affirmatively on this proposed amendment. And yet in view of the subsequent ratifications—nineteen since 1929—this proposed amendment must have been debated before a large number of State Legislatures during the legislative year of 1929.

The potency of the amendment must be determined by what the people deem necessary. It is the deemed necessity for the amendment that gives it life and the same force must continue its life. This is in accord with the statement of Judge Jameson, quoted approvingly by this court (*Dillon v. Gloss, supra.*) "that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived."

The record in this case is replete with evidence that the felt need for the amendment is as strong today as when the resolution was adopted by the congress. The proposed amendment must continue to live as long as it is supported by a recognized need, or until such time as a sort of statute of limitations may be said to have run against any power to ratify the proposal. It appears to us that it may be akin to the law of laches which in a general sense is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. "The laws serve the vigilant and not those who sleep over their rights." Certainly there has been no lack of vigilance in keeping the necessity of this amendment before the people, and its consideration by their representatives in the state legislatures.

The congress had the power in the adoption of the resolution to place a reasonable limitation on its consideration by the states, but it did not exercise this power. The limitation, if any, must be fixed by this

court and it appears to us that before this court could say that the proposed amendment is dead that it must find that its death is the result of the neglect of the states not to ratify but to fail to continue its consideration. This the states have not done. Much consideration should be given to the fact that no limitation was placed upon the period in which this proposed amendment could be ratified. Congress could have placed a limitation upon the time for ratification but failed to do so. Such action must imply the fact that Congress did not desire to limit the time. For by placing a limitation upon the time for ratification, Congress is limiting a right—the right of States to ratify. Limitation is what the name implies:

"Statutes of limitation do not confer any right of action, but are enacted to restrict the period within which the right, otherwise unlimited, might be asserted." (37 C. J. 684.)

The failure of Congress to place a limitation upon the time in which the proposed amendment could be ratified is an indication that it did not desire to restrict the States, for limitations had been applied in former submissions.

Petitioners argue that since a seven-year period of limitation was upheld in the case of Dillon v. Gloss, *supra*, such period of time is controlling in this case. This Court, in that case, only verified the judgment of Congress to the effect that seven years was reasonable in that submission. Each case must rest upon its own

facts. A highly controverted question may demand much more time, not because of any lack of need or interest, but because of concentrated opposition on the part of a few selfishly interested..

There may be occasions, and no doubt are, when Congress discerning the need for amendments greatly in advance of the States, would not desire to place a limitation upon the time for ratification. It would be unusual if Congress did not feel the need for amendments long before the States and their inhabitants did. In such cases Congress realizing the necessity of education, would not desire to limit the time for ratification. The process of ratification would be slow as it has in this case.

There is another argument not advanced by the Courts or students of constitutional law which appeals to us. It will be noted that the Federal Constitution provides two methods of ratifying, i. e., the proposal is submitted to the legislatures or to state conventions. A legislature is a permanent coordinated branch of state government exercising law-making powers under the constitutions of the several states. The personnel comprising the legislature may change from time to time but the powers, privileges, and duties of the legislature are continuing, unaffected and undiminished by any change of personnel. A convention is an extraordinary body of representatives of the people convening only on a special occasion for a specific purpose. It comes into existence for a specific purpose, it acts, and upon adjournment sine die, it becomes functus officio.

The petitioners, throughout their argument urged that the powers of a legislature and constitutional convention are identical with reference to the ratification of a proposed amendment; that those powers are only for the purpose of expressing the sentiments of the people upon the proposed amendment. These statements are but half truths. That the legislature is a permanent body, continually exercising sovereign rights in the government of the state, is completely overlooked by the petitioners. If the congress had specified ratification of a proposed amendment by convention, as it well could have done under the constitution, then some implication might arise that it contemplated an immediate expression of the will of the people concerning the ratification of the proposal. The normal procedure would have been to call the conventions in the several states for the sole and only purpose of passing upon the proposed amendment. Much argument could be made that such action taken by this extraordinary body of representatives was fully and completely binding upon the people. However, we are of the opinion that even under such circumstances a future convention selected in the same way again could take a contrary action and delegate to the general government the governmental powers sought in the proposed amendment. When, however, a convention delegates to the general government the powers sought by the proposed amendment, no future representatives of the people of the state could undo the action taken.

In this case, the Congress has specified that ratification should be made by the legislatures of the several

states. The selection of this method of ratification conveys the idea that the proposal to amend would and should remain alive indefinitely, because that legislative body is alive permanently. It is, however, interesting to note that the petitioner cites no authority nor circumstances to show that this request for additional power has been abandoned by congress. We contend that this proposal to amend the federal constitution remains alive until some effective action is taken by Congress to extinguish it.

The abolition of child labor did not cease to be of vital interest during any of the period since 1924, when this proposed amendment was submitted. It ever has been a matter of paramount importance to our country. States have enacted laws requiring attendance in schools on the part of all children, in order that illiteracy may be replaced by literacy and that our government may be supported and maintained by citizens educated, trained and enlightened on the principles of democracy. Juvenile Courts have been created, Probation officers appointed; playgrounds established and supervised to guide youth toward a true standard of life. Educated citizens with ability and knowledge coming from training are needful to a democracy. Realizing the deterrent to such program coming from private and selfish interests in the form of inducements to work for small pittances, the people realized the necessity for a Child Labor Amendment. That necessity has not diminished, but rather increased. With unemployment increasing the economic need for abolition of Child Labor asserts itself.

alongside that of the moral or spiritual need. The proposed Child Labor amendment remains alive because it never ceased to be vital to the present needs of our country, nor was the interest in it stifled.

CONCLUSION.

We therefore, conclude that the decision of the Court below should be upheld. It is based upon true logic and reasoning, and supported by ample authority.

Respectfully submitted,

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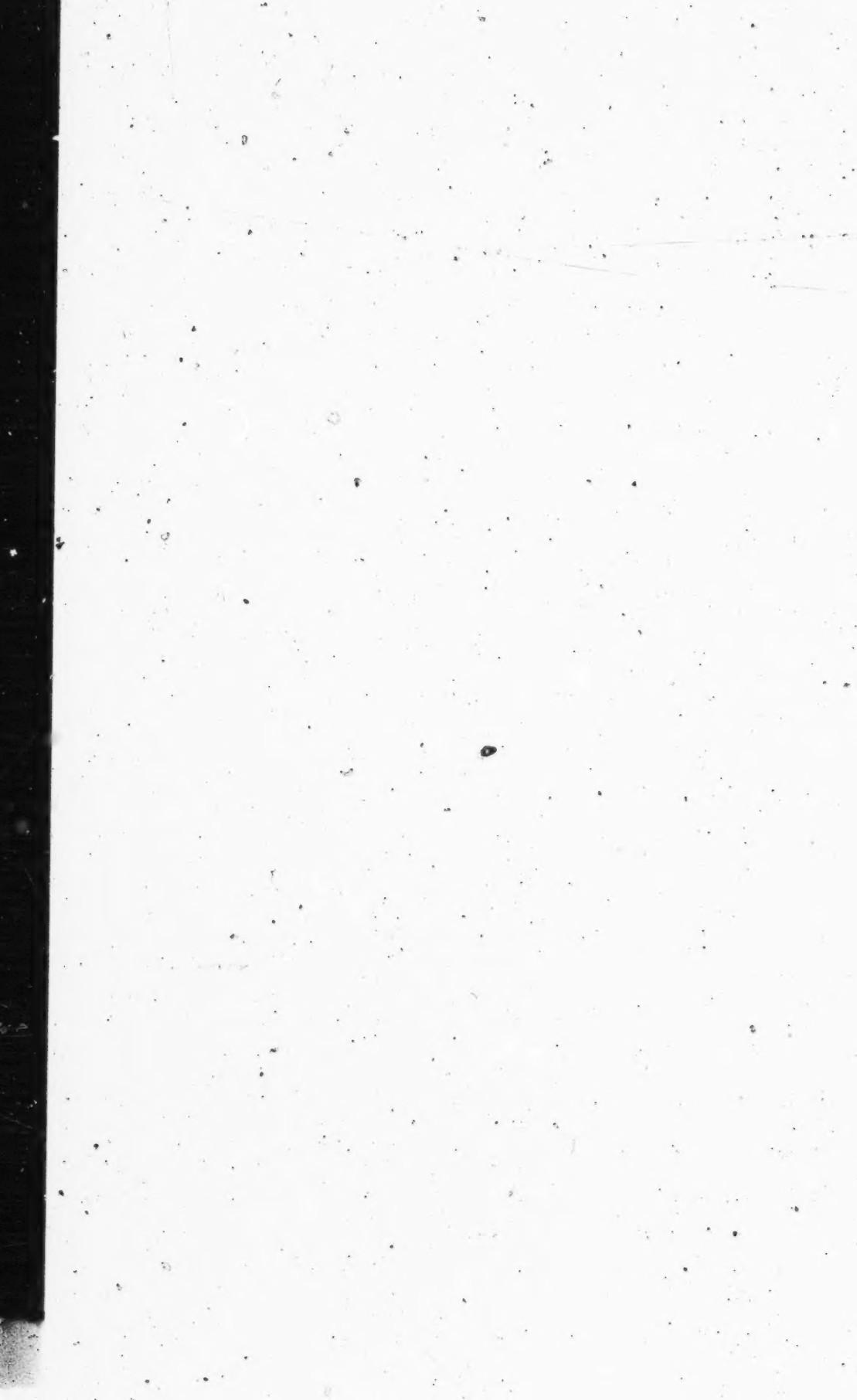
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CHARLES ELMORE DRO
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No. [REDACTED] 7

In the Supreme Court of the United States

OCTOBER TERM, 1937

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C.
BRADNEY, ET AL., PETITIONERS,

v.

CLARENCE W. MILLER, AS SECRETARY OF THE SENATE
OF THE STATE OF KANSAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF KANSAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS
CURIAE

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 796

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C.
BRADNEY, ET AL., PETITIONERS,

v.

CLARENCE W. MILLER, AS SECRETARY OF THE SENATE
OF THE STATE OF KANSAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF KANSAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS
CURIAE

The petition for certiorari herein seeks review of the decision of the Supreme Court of Kansas holding ineffective the ratification by the legislature of Kansas of the proposed Child Labor Amendment to the Federal Constitution submitted to the States by the Congress on June 2, 1924. The questions presented by the petition are: (1) whether the Lieutenant-Governor of Kansas was entitled to cast the deciding vote in the State sen-

ate on the concurrent resolution ratifying the proposed Amendment; (2) whether the legislature of Kansas could effectively ratify the proposed Amendment in view of the fact that it had previously voted to reject the Amendment and that more than one-fourth of the States have at some previous time since the submission of the Amendment likewise voted to reject it; and (3) whether the passage of time since the date of submission of the Amendment has rendered it no longer susceptible of ratification. The Supreme Court of Kansas determined each of the questions in favor of the validity of the ratification. It is believed that the conclusion reached by the court below is sound.

The first of the questions presented appears to depend solely upon a construction of the State constitution, as to which it is assumed that the decision below is conclusive. The remaining questions, however, involve issues of Federal law which are of outstanding public interest, inasmuch as they are of controlling importance in determining whether the proposed Child Labor Amendment may now be ratified. Until these questions are determined, there necessarily will be uncertainty on the part of the Congress and the States alike, particularly since a decision in conflict with that of the Supreme Court of Kansas has recently been rendered by the Court of Errors and Appeals of Kentucky. *Wise v. Chandler*, 270 Ky. 1.

Requests have been made on behalf of the States of Arkansas, California, Illinois, Indiana, Minnesota, New Mexico, Oregon, Utah, Wisconsin and Wyoming, through their respective Governors or Attorneys General, that appropriate steps be taken if possible toward securing an authoritative decision in the present case clarifying the status of the proposed Amendment.

In view of the national public interest and the importance of the constitutional questions involved, the Government, with the permission of the Court, desires to submit a brief as *amicus curiae* in support of the decision of the Supreme Court of Kansas if certiorari is granted.

It is recognized that a question exists concerning the standing of the petitioners to raise the constitutional issues in this Court. Since, however, both petitioners and respondents are officers of the State, and since the State court took jurisdiction and passed upon the merits, a discussion of the standing of petitioners would not seem to be appropriate in this memorandum on behalf of the United States as *amicus curiae*.

Respectfully submitted,

HOMER CUMMINGOS,

Attorney General.

MARCH 1938.



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CHARLES EUGENE MOBLEY

Single Supreme Court of the United States

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OF THE STATE OF KANSAS, ET AL.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
KANSAS**

**ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND
AS GOVERNOR OF THE COMMONWEALTH OF KEN-
TUCKY, ET AL., DEFENDANTS**

JAMES W. WISE AND RAY L. MOSS

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
KENTUCKY**

FOR THE UNITED STATES AMICUS CURIAE



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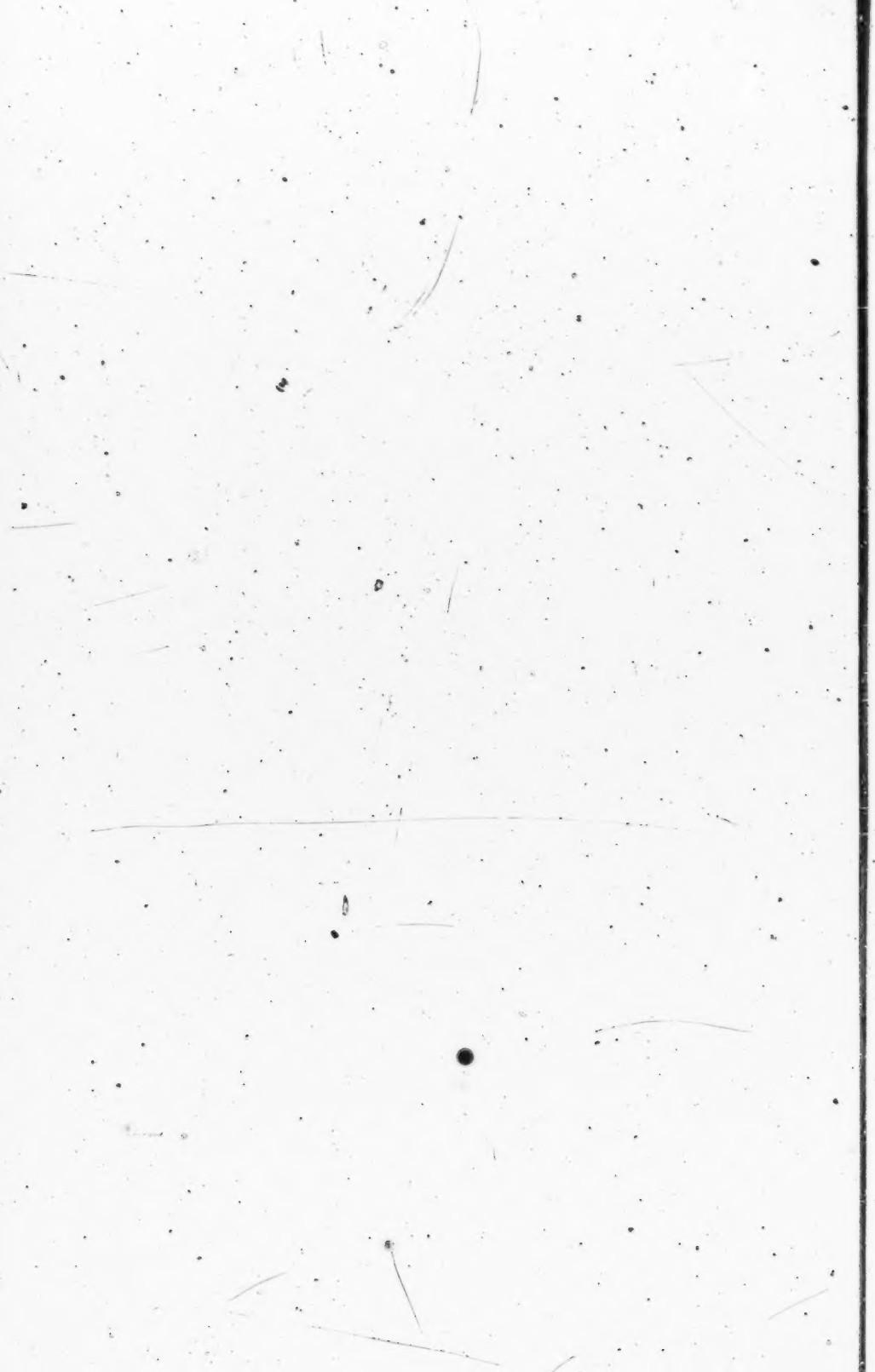
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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 7

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C.
BRADNEY, ET AL., PETITIONERS

v.

CLARENCE W. MILLER, AS SECRETARY OF THE SENATE
OF THE STATE OF KANSAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
KANSAS

No. 14

ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND
AS GOVERNOR OF THE COMMONWEALTH OF KEN-
TUCKY, ET AL., PETITIONERS

v.

JAMES W. WISE AND RAY B. MOSS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
KENTUCKY

BRIEF FOR THE UNITED STATES AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of Kansas in
No. 7 (R. 34-51) is reported in 146 Kan. 390. The

opinion of the Court of Appeals of Kentucky in No. 14 (R. 34-55) is reported in 270 Ky. 1.

JURISDICTION

In No. 7 final judgment was entered September 16, 1937, and rehearing denied October 16, 1937 (R. 31-32, 61). Time for filing petition for certiorari was extended (R. 64) and certiorari was granted March 28, 1938. In No. 14 final judgment was entered December 17, 1937 (R. 33). Time for filing petition for certiorari was extended (R. 56) and certiorari was granted April 11, 1938. The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the ratifications of the proposed Child Labor Amendment by the legislatures of Kansas and Kentucky are invalid by reason of the prior rejection of the Amendment in those States or by reason of the prior rejection of the Amendment in more than one fourth of the States.
2. Whether the proposed Child Labor Amendment was no longer susceptible of ratification by reason of the time elapsed since its submission.
3. Whether the constitutional questions decided by the state courts may properly be reviewed by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article V of the Constitution of the United States:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The proposed Amendment relating to the regulation of child labor reads as follows (43 Stat. 670):

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled (two-thirds of each House concurring therein), That the follow-

ing article is proposed as an amendment to the Constitution of the United States, which, when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:

"ARTICLE —

"SECTION 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"SEC. 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

F. H. GILLET

Speaker of the House of Representatives.

ALBERT B. CUMMINS

President pro tempore of the Senate.

I certify that this Joint Resolution originated in the House of Representatives.

WM. TYLER PAGE

Clerk.

Deposited in the Department of State,
June 4, 1924.

STATEMENT

In both the Kansas and Kentucky cases the complainants are citizens and members of the state legislatures who voted against ratification of the proposed Child Labor Amendment. In each case the defendants are officers of the two houses of the legislature, with the addition in the Kansas case of

the State itself as a defendant, and in the Kentucky case of the Governor of the State. In each case the validity of the resolution of ratification was challenged on the ground that the State, having once rejected the amendment, could not thereafter ratify; that since more than one-fourth of the States had rejected the amendment no State could thereafter ratify; and that the amendment was no longer susceptible of ratification because of the lapse of time since its submission.¹

In the Kentucky case the complainants sought an injunction to restrain the Governor and other defendants from notifying the Secretary of State of the United States of the passage of the resolution of ratification. As the Governor, without knowledge of the pendency of the suit, had transmitted such notification to Washington on the day suit was begun, the relief sought was amended to request a mandatory injunction directing the Governor to notify the Secretary of State that the resolution of ratification was void and that the prior notification should be disregarded (No. 14, R. 11-12, 25, 34-35). In the Kansas case the complainants sought a writ of mandamus to compel the erasure of the indorsement of the ratifying resolution, and an injunction

¹ In the Kansas case the additional argument was made that the ratification was invalid because the Lieutenant Governor of the State was not entitled to cast the deciding vote in the Senate. This question was decided adversely to the complainants by the Supreme Court of Kansas and is not discussed herein.

against the defendants restraining them from causing the resolution to be enrolled, signed, certified, published, or delivered to the Governor or transmitted to the Secretary of State of the United States (No. 7, R. 10-11).

Both courts entertained the suits and passed on the constitutional questions raised.

The Kansas court sustained the validity of the ratifying resolution but stayed its judgment pending final decision by this Court, the resolution meanwhile having been ordered placed in the custody of the court (No. 7, R. 19, 62).

The Kentucky court held the ratifying resolution invalid and, in lieu of issuing a mandatory injunction directed against the Governor, ordered that an authenticated copy of its judgment be transmitted to the Secretary of State of the United States (No. 14, R. 55). The records of the Department of State show that on December 13, 1937, there was received a communication from the Clerk of the Franklin Circuit Court of Kentucky, dated December 11, 1937, enclosing a certified copy of the judgment of that court on the remand to it by the Court of Appeals, and of the opinion and mandate of the Court of Appeals entered November 6, 1937. The communication stated that "the Resolution adopted by the Kentucky Legislature on January 13th, 1937, purporting to ratify the proposed Child Labor Amendment to the Constitution of the United States has been held invalid by this Court and the

Kentucky Court of Appeals, and that the proposed amendment has not been ratified by the Legislature of Kentucky according to the provisions of the Constitution of the United States. You are notified that the notice sent you by Honorable A. B. Chandler, Governor of Kentucky, dated January 15th, 1937, was and is void and of no effect." Subsequently, on January 3, 1938, as shown also by the records of the Department of State, counsel for complainants transmitted to the Secretary a certified copy of the mandate of the Court of Appeals of Kentucky, affirming the judgment of the Franklin Circuit Court of December 6, 1937, and constituting the final judgment of the Court of Appeals.

In the Kansas case the petition for certiorari was filed by the complainants below, and in the Kentucky case by the defendants below. The petitions were granted by this Court on March 28, 1938, and April 11, 1938, respectively.

SUMMARY OF ARGUMENT

I

The ratifications of the Child Labor Amendment by Kansas and Kentucky are not invalid by reason of the fact that the legislatures of those States had previously rejected the amendment. Article V of the Constitution speaks in terms of ratification; the concept of rejection is extra-constitutional. If that concept is introduced as a constitutional limitation, the effect will be confusion and uncertainty,

since definitions of the concept of rejection will vary. The deliberative and legislative character of the ratifying process supports the view that a state should be at liberty to renounce a prior rejection. The adoption of the Fourteenth Amendment assumes the power of the States to change from a negative to an affirmative position with respect to a proposed amendment, and this power appears to have been recognized by both the executive and legislative branches of the Government on that occasion. The same understanding has continued to prevail with scarcely a dissent. The analogy to ratifying conventions is not controlling; and if it were, there is no reason why a subsequent convention might not ratify after a prior one had rejected, as was done in the case of the Constitution itself by North Carolina. If it be established that a state may change from rejection to ratification, no good reason is perceived why it may not do so when more than one-fourth of the States have rejected.

II

The Child Labor Amendment had not lapsed by the passage of time since its submission to the States in 1924. The argument to the contrary assumes that the courts may be required to determine whether a proposed amendment has lapsed despite the belief of state legislatures that it is still pending. The argument assumes also that States which have ratified are powerless to withdraw their rati-

fifications and thus protect themselves against supplementary untimely ratifications by other States. Whether ratifications may be withdrawn is a question still unsettled. There is no need in these cases to consider the extent of the duty of the courts or the power of States to withdraw their ratifications, since it plainly appears that the Child Labor Amendment has retained its vitality. Congress deliberately declined to place a time limit on ratification in the Amendment. In 1931, seven years after its submission, it was ratified by the sixth State. This ratification was clearly timely. In 1933, the next year during which state legislatures regularly met, there was a ferment of activity in relation to the Amendment, which has continued to the present time. That it has not lapsed has been the understanding of Congress, the state legislatures, and representative non-official organizations.

III

The constitutional questions are properly before this Court. In the Kentucky case the petitioners are public officers performing a Federal function and are seeking to sustain the validity of the act of ratification. Decisions holding that public officers may not invoke the jurisdiction of this Court in their official capacity to challenge the constitutionality of state action are therefore inapplicable. The case is not academic. To prevent official notice

of the action of the State from reaching the Secretary of State of the United States is an interference with the amending process both as a matter of law and of fact. Official notice from the State is conclusive on the Secretary with regard to the procedural validity of the ratification, and the proclamation of the Secretary is conclusive on the courts in that regard. As a practical matter, moreover, the orderly receipt of official notice tends to avoid confusion and uncertainty. The historic background of the provision for official notice, first enacted in 1818, indicates the importance of the provision. The question of the validity of ratification is not premature; this Court has decided the validity of a method of ratification while an amendment was still pending before the states. In the Kansas case the petitioners are public officers attacking the validity of the claimed ratification, and consequently their standing in this Court is more questionable. It should be pointed out, however, that at least two of the petitioners appear to have been members of the state legislature at the time when the Amendment was previously rejected, and on that occasion to have cast their votes for rejection. The present suit may therefore be regarded as an effort on their part to protect and vindicate their votes as against what is asserted to be a spurious countervailing act.

ARGUMENT**I****THE RATIFICATIONS OF KANSAS AND KENTUCKY ARE
NOT INVALID BY REASON OF THEIR PRIOR REJECTIONS
OR THE REJECTIONS OF MORE THAN ONE FOURTH OF
THE STATES**

Resolutions rejecting the proposed Child Labor Amendment were passed by the legislatures of 19 States. In 8 of these States, including Kansas and Kentucky, the legislatures subsequently adopted resolutions of ratification. It is our position that these legislatures were completely at liberty to ratify the Amendment.

Any discussion of the power of a state legislature to change from a negative to an affirmative vote in relation to ratification must necessarily start with the text of Article V of the Constitution. That Article speaks in terms of ratification; the concept of rejection is not there to be found. Rejection is, therefore, an extra-constitutional concept. In our view, a vote of rejection of a proposed amendment, or an adverse vote, or a failure to pass a resolution of ratification, must all stand on the same footing and are all constitutionally neutral events.

If the concept of rejection is once imported as a constitutional limitation on further action by a legislature, it is necessary to define the concept. If it means anything, it means an affirmative vote of rejection by both houses. But logically it must

mean more. The resolution may be in form one for ratification, and the resolution may be introduced and defeated in both houses, or, as in Nebraska, introduced and defeated in a unicameral legislature. In substance this action is the same as the adoption of a resolution of rejection. Certainly the form of the resolution, whether affirmative or negative—a matter, as likely as not, quite fortuitous—should not determine whether the legislature is deemed to have rejected the proposed Amendment. If the form of the resolution is not controlling, then many diverse forms of legislative action will have to be appraised in terms of the same concept of rejection. A resolution of rejection may be passed in one house and a resolution of ratification defeated in the other. A resolution of ratification may be defeated in one house and not reached for a vote in the other; or passed in one house and defeated in the other; or passed in one house and indefinitely postponed in the other; or passed in one house and not reached for a vote during the legislative session of the other; or passed by both houses with conditions or alterations. In each of these instances the resolution of ratification will have been lost, or have failed of passage, just as if both houses had voted it down. Must the proposed amendment be regarded in these circumstances as rejected by the legislature, so that at a subsequent session the amendment cannot again be brought up for consideration and vote? It is believed that

those who would hold a legislature to a rejection would stop short of imposing so drastic a restriction on the amending process. But if the concept of rejection is introduced as a constitutional limitation, some more precise definition of the term should be vouchsafed. The logical and practical difficulties attendant upon a definition of rejection are as serious as the importation of the concept is gratuitous.

Furthermore, the notion of rejection as precluding reconsideration by a legislature is hostile to the deliberative and representative character of the amending process. In that process, in greater measure perhaps than in any other governmental function, ample opportunity for deliberation is of first importance. Cf. Federalist, No. 43; 2 Story on the Constitution (5th ed.), p. 600. It is of the essence that there be opportunity, at least before rights have become vested, for renewed consideration in the light of fuller knowledge and further reflection. The tendency to reject what is novel may induce a rejection which on more sober second thought will appear to have been ill-considered. Or the rejection may have sprung from a misapprehension of the popular will, only subsequently made clear. There should be no vested rights in action thus regretted and renounced. Laying aside the question of lapse of time—a separate matter to be discussed hereinafter—the amending process being a function both deliberative and representative; it is an essential condition of the performance of that

function that there be allowed to a legislature a *locus poenitentiae*.

But the argument does not rest alone on the text and the spirit of Article V. It rests also on historic practice and common understanding. The proposed Child Labor Amendment has not furnished the first occasion for the ratification by state legislatures of a proposed amendment which they had previously rejected.

The Thirteenth Amendment was ratified by New Jersey after it had been voted down in both houses.² The ratification was subsequent, however, to the adoption of the Amendment by the requisite majority of States. But in the case of the Fourteenth Amendment such action was of critical importance. At the time of the proclamation of the Fourteenth Amendment there were 37 States, 28 thus being required to constitute a majority of three-fourths. The adoption was proclaimed by Secretary of State Seward on July 28, 1868, with 30 States enumerated as having ratified (15 Stat. 708, Appendix, *infra*, 57). Of those 30 States, 7 had previously rejected the Amendment: Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, and South Carolina.³ Hence in only 23 of the ratifying

² See S. J. Res. 2, N. J. Sen. Jour. 1865, p. 472; Assembly Bill 115, N. J. Assem. Jour. 1865, p. 392; N. J. L. 1866, p. 1093.

³ Ala. Acts 1865-1866, p. 607; Ark. Acts 1866-1867, p. 550; Fla. Laws 1866, p. 86; Ga. Laws 1866, p. 216; La. Acts 1867, p. 9; N. Car. Laws 1866-1867, p. 213; S. Car. R. & R. 1866, p. 220.

States—5 less than 'the requisite majority—was ratification the initial action taken. Subsequent to the proclamation of the Secretary of State, the legislatures of 3 additional States—Virginia, Mississippi, and Texas—ratified, but in each of these States there had likewise been a previous rejection.⁴ An argument which would carry with it the present downfall of the Fourteenth Amendment is one to be viewed, at the very least, with skepticism.

Particularly is this true when the Congressional and executive action in relation to the adoption of the Fourteenth Amendment are recalled. On July 20, 1868, Secretary Seward issued a conditional proclamation (15 Stat. 706, Appendix C, *infra*, 53) setting forth that the Amendment had been ratified by the legislatures of 23 States and in addition "by newly constituted and newly established bodies avowing themselves to be and acting as the legislatures, respectively, of the States of Arkansas, Florida, North Carolina, South Carolina, and Alabama"; that the legislatures of 2 of the 23 States first enumerated—Ohio and New Jersey—had since passed resolutions withdrawing the consent of each to the Amendment; that it is "deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent" of the 2 States; and

⁴ Miss. Laws 1866-1867, p. 734; 1870, p. 631; Tex. Laws 1866, p. 266; Tex. H. J. 1870, p. 33; Tex. S. J. 1870, p. 28; Va. Acts Assembly 1866-1867, p. 508; 1867-1870, p. 3.

certifying that "if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned, and so has become valid, to all intents and purposes, as a part of the Constitution of the United States." It will be observed that in this carefully drawn document Secretary Seward was concerned with 2 questions: the status of the legislatures in the southern States and the authority of 2 northern States to revoke their ratifications. Evidently no doubt was entertained that if the legislatures of the southern States were lawful bodies they were empowered to ratify despite prior rejection in the same States. That the fact of the previous rejections was known to the Secretary could not be doubted, in view of the background of the Reconstruction Acts of the previous year; ⁵ and in fact, in his subsequent final

⁵ The recalcitrance of the southern States with respect to ratification of the Fourteenth Amendment was one of the factors contributing to the enactment of the Reconstruction Acts of 1867. See 3 Thorpe, *Constitutional History of the United States* (1901), 336; 2 Curtis, *Constitutional History of the United States* (1896), pp. 380-381. The Act of March 2, 1867 (14 Stat. 429) made ratification of the Fourteenth Amendment a condition precedent to representation of the southern States in Congress. See *White v. Hart*, 13 Wall. 646.

proclamation, on July 28, 1868 (Appendix C, *infra*, p. 60) it is shown that official notice of the prior rejections of 3 States—North Carolina, South Carolina, and Georgia—had been formally transmitted and received.

Meanwhile the entire matter had been brought to the attention of Congress. On July 9, 1868, the Senate adopted a resolution requesting the Secretary of State to transmit a list of the States whose legislatures had ratified the proposed Fourteenth Amendments (Cong. Globe, 40th Cong., 2d Sess., p. 3857). On July 15 the President transmitted to the Senate the report of the Secretary of State in compliance with the resolution; that report listed all the ratifying States and drew special attention to the question raised by the action of Ohio and New Jersey (*idem*, p. 4070; State Archives, 14th Amendment). Three days later, on July 18, Senator Sherman introduced a resolution, which was referred to the Judiciary Committee, declaring the ratification of the Fourteenth Amendment (*idem*, p. 4197). On July 21, the day following the conditional proclamation of the Secretary, described above, the Senate unanimously adopted the Sherman resolution; and the House passed it on the same day (*idem*, pp. 4295-4296). This resolution, which was incorporated by the Secretary in his final proclamation on July 28 (Appendix, *infra*, p. 59), listed 29 States as having ratified,* including

* The ratification of Georgia occurred on the day the resolution was passed; official notice was received on July

the southern States which had previously rejected the Amendment, as well as Ohio and New Jersey. Although some doubt was expressed in Congress concerning the correctness of including the latter 2 States,²⁸ and of counting the southern States as members of the Union in computing the necessary majority,²⁹ no question was made with respect to the power of a State to ratify after a prior rejection. Thus the resolution of Congress and the action of the Secretary of State constitute legislative and executive recognition of the view here contended for, a view on which depends, as has been shown, the validity of the adoption of the Fourteenth Amendment.

This view has continued to prevail with scarcely a dissent. In 1924 Congress considered a proposal, known as the Wadsworth-Garrett Amendment, to amend Article V in several respects. The measure provided that at least one branch of a ratifying legislature must have been elected subsequent to

28, and Georgia was included in the proclamation of that date as the 30th ratifying State.

²⁸ See the argument of Senator Reverdy Johnson, *Congressional Globe*, 40th Cong., 2d Sess., p. 878.

²⁹ See the argument of Senator Sumner, *Idem.*, pp. 877-878. That only the so-called loyal States should have been counted is the position taken also by Professor Burgess in *Reconstruction and the Constitution* (1902), pp. 81, 205-206. The method adopted by Congress and Secretary Seward was, however, accepted and approved by the Court in *White v. Hart*, 13 Wall. 646, 649-652. See Orfield, *The Federal Amending Power*, 25 Ill. Law Review, 418, 440, Note 53.

the submission of the amendment; that a State might require that a ratification of its legislature be subject to confirmation by popular vote; and that a State might change its vote at any time before three-fourths had ratified or more than one-fourth had rejected or defeated an amendment (66 Cong. Rec., 2152-2153, 65 *id.* 4493). Only the third of these items is relevant here. In explaining the extent to which the proposal altered existing law, the authors of the resolution were explicit in stating that with respect to a change by a legislature from rejection or defeat of a pending amendment to ratification, the only alteration proposed was the termination of such power when more than one-fourth of the States rejected or defeated the amendment. The existing law was thus stated by Senator Wadsworth (65 Cong. Rec. 4492): "The legislature of a state may change from the negative to the affirmative at any time." And Congressman Garrett voiced the same understanding: "A state which has said 'no' may now change and say 'yes'" (*idem*, 2159). The proposal was designed to assure the same freedom of change to an assenting State (as to which the existing law was thought to be contrary, though not free from doubt (see *idem*, p. 2153); and to alter existing law by providing that an amendment would not be susceptible of ratification where unrevoked rejections occurred in more than one-fourth of the States. The proposal was re-committed to the Judiciary Committee in the Sen-

ate (*idem*, 5009) and did not reach a vote in the House. The importance of the episode for present purposes is that it evidences the unquestioned understanding of the present law as permitting free withdrawal by a legislature of an adverse vote on a proposed amendment.*

The same understanding of the power of the state legislature to change from negative to affirmative action has been expressed by students of the amending process. Judge Jameson, whose notable work on constitutional conventions has been followed by this Court in relation to another issue,¹⁰ recounts the precedent of the Fourteenth Amendment and adds that "the right of a state legislature, after a negative vote has once been passed, to recede from it and ratify an amendment, is, we think, upon prin-

* The same position was taken by the Solicitor of the Department of State in relation to the ratification by Arkansas of the Sixteenth Amendment. Although that State was not necessary to make up a three-fourths majority, the question was considered whether it should be included in the proclamation in view of the fact that, as the Solicitor thought, it had previously rejected the amendment. Actually, the official notice received by the Department of State showed only that earlier in the session the amendment had been ratified by one house and the resolution of ratification defeated in the other. In a considered memorandum of February 20, 1913, the Solicitor advised the inclusion of the State, citing the precedent of the Fourteenth Amendment; and Arkansas was in fact included in the proclamation of the Secretary. (See State Archives, Sixteenth Amendment.) The treatment of the prior action of the State as a rejection is an illustration of the problems arising from an importation of that concept into this field.

¹⁰ See *Dillon v. Gloss*, 256 U. S. 368, 375.

ciple, unquestionable" (4th Ed., p. 628). Among the considerations leading to this conclusion Judge Jameson stresses the terms of Article V and the essential similarity of the several forms of mere failure to ratify, including an affirmative vote of rejection. Others have found additional support for this view in the analogy of municipal bond elections, where it is held that an enabling act authorizes subsequent elections following an adverse vote. See 2 Watson, *Constitution of the United States* (1910), pp. 1317-1318; Cooley, *Principles of Constitutional Law* (3rd Ed.), pp. 222-223; (4th Ed.), p. 257. Whether on the basis of precedent, principle, or analogy, the same conclusion has been reached by virtually all who have discussed the question. The following may be cited: Ames, *Proposed Amendments to the Constitution* (House Doc. 353, Part II, 54th Cong., 2d Sess., pp. 299-300); Burdick, *Law of the American Constitution* (1922) 43; McLaughlin, *Constitutional History of the United States* (1936), p. 679; 1 Willoughby, *Constitutional Law of the United States* (1929), p. 593; Dodd, *Amending the Federal Constitution*, 30 Yale Law Journal, 321, 347; Garrett, *Amending the Federal Constitution*, 7 Tenn. Law Rev., 286, 294; Grinnell, *Finality of a State's Ratification of Constitutional Amendments*, 11 A. B. A. J., 192; Miller, *Amendment of the Federal Constitution*, 60 American Law Rev., 181; Orfield, *Federal Amending Power*, 25 Ill. Law Rev., 418, 439; Wheeler, *May Ratification be Repealed?* 20 Case and Comment, 548, 550. Contra: Cadwal-

lader, *Amending the Federal Constitution*, 60 American Law Rev., 389, 392.

All that has been said is applicable to meet the further contention that when more than one-fourth of the States have rejected an amendment it can no longer be ratified. It is not apparent why an exception should be created in such circumstances to the rule that a State may freely change from a negative to an affirmative vote. It is noteworthy that the precedent of the Fourteenth Amendment is strictly relevant on this question since 10 States out of 37 rejected the amendment before any of the 10 ratified. See pp. 14-15, *supra*, and Flack, *Adoption of the Fourteenth Amendment* (1908), ch. 4. It will also be recalled that the Wadsworth-Garrett proposal, discussed *supra*, pp. 18-20, under which the rejection or defeat of an amendment by more than one-fourth of the States would preclude further action, was deemed to effect a change in existing law in this regard. The question was again considered in the House of Representatives in 1926 with respect to the Child Labor Amendment itself. A resolution was introduced by Congressman Garrett requesting the Secretary of State to transmit to the House a statement showing what States had taken action on the amendment and what such action had been, "giving in each instance, where available, the votes in the several legislatures that have acted" (67 Cong. Rec. 1506). It was feared by supporters of the amendment that the resolution

was designed to lay a foundation for the claim that the amendment was irretrievably lost; but in response to questions the author of the resolution made clear his position that a rejecting State might subsequently ratify provided it did so within a reasonable time (*ibid.*). The resolution was adopted, and the Secretary of State transmitted the information, showing that from the records of the Department it appeared that in 4 States the amendment had been ratified, in 13 it had been affirmatively rejected, in 3 it had failed of ratification in both houses, and in 6 adverse action on it had been taken in some form by one house (67 Cong. Rec. 3801). Despite this showing that more than one-fourth of the States had affirmatively rejected the amendment, no steps were taken in the direction of declaring the proposal lapsed.¹¹

Only a word need be added concerning the argument, elaborately stressed in the opinion of the Kentucky court, that since a state convention would exhaust the power of the State by rejecting an amendment, the same must be true of a state legislature. If the premise were sound, the conclusion would not necessarily follow. The premise, however, is exceedingly questionable. No good reason

¹¹ A resolution to amend R. S. 205 by requiring the Secretary of State to publish the rejections of state legislatures or conventions when more than one-fourth of the States had so acted was introduced at the same session and referred to the Judiciary Committee of the House, but was not reported out. 67 Cong. Rec. 396.

is perceived why a convention might not legitimately reconsider an adverse vote or why a new convention might not subsequently ratify. It is worth recalling that the Federal Constitution itself was ratified by a convention in North Carolina more than two years after an earlier convention in that State had rejected it. See Warren, *Making of the Constitution* (1928), p. 820.

It is submitted, then, that the legislatures of Kansas and Kentucky were free to ratify the Child Labor Amendment despite their prior vote of rejection and despite the prior concurrence of such rejections in more than one-fourth of the States.

II

THE RATIFICATIONS ARE NOT INVALID BY REASON OF LAPSE OF TIME SINCE SUBMISSION OF THE AMENDMENT

The second major question presented is whether the Child Labor Amendment was no longer susceptible of ratification because of the interval of time, 12 years and 7 months in the case of Kentucky and 12 years and 8 months in the case of Kansas, elapsing between submission to the States and these ratifications. The argument is, in effect, that a conclusive presumption of death arises upon the passage of such a period, a presumption akin to that arising from seven years' unexplained absence without being heard from. But the Child Labor Amendment has been heard from incessantly. If

mortality is an attribute of proposed amendments, it is clear with respect to the Child Labor Amendment that death could not have been caused by atrophy, but only by activity; and that, it is submitted, is not a basis for establishing the legal death of an amendment.

Before proceeding to consider the history of the Child Labor Amendment since its submission, two preliminary points should be made. The first is that where an amendment is submitted to Congress by state legislatures, the measurement of time in terms of years may be misleading. In all but a very few States, as the Court judicially knows, regular sessions of the legislature are held only every other year, generally in the odd-numbered years. Measurement of time in terms of regular legislative sessions tends to reduce appreciably the period elapsed between submission and ratification.

The second preliminary consideration is that the complainants in these cases, and the Kentucky court, have assumed that the question of what is a reasonable period for the adoption of an amendment is a justiciable question; to support this assumption *Dillon v. Gloss*, 256 U. S. 368, is cited. That case sustained the power of Congress to fix a time limit of seven years for the adoption of the Eighteenth Amendment. It was unnecessary in that case to consider whether a proposed amendment would expire with the passage of time in the absence of such a provision, and still less to con-

sider whether the courts could be required to decide that a proposed amendment had in fact expired. It is true that the opinion in the case expressed the view that an amendment cannot pend indefinitely, but nothing was said concerning the authority which would be empowered to declare that the end had come. The answer to the latter question may well turn on the answer to another: whether States which have once ratified may thereafter revoke or rescind their ratification. If they can, the danger that a few States may supplement prior ratifications of an outdated proposed amendment is largely obviated; the States that have ratified can protect themselves by rescinding. The power of the States so to do has not been judicially determined. Unless and until the power is held not to exist, much of the force is taken from the position that the courts may be required to decide whether a proposed amendment has lapsed. It is perhaps enough to say that distinguished authority can be found for the view that, until an amendment has been adopted by the ratifications of three-fourths of the States, the States do have power to rescind their ratifications.¹²

¹² See the communications from George Ticknor Curtis, Senator Reverdy Johnson of Maryland, and William O'Conor of New York, included in the Address of C. H. Winfield in the New Jersey Senate, February 19, 1868, in support of the resolution to withdraw the assent of New Jersey to the proposed Fourteenth Amendment (privately printed, Jersey City, 1868). See also New Jersey Laws 1868, p. 1225; Congressional Globe, 40th Cong., 2d Sess., p. 878.

Decision of these questions is unnecessary in the present case, if, as we believe, it is plain that an unreasonably long period has not elapsed since the submission of the Child Labor Amendment. The importance of deliberation in the amending process has already been adverted to. (See p. 13, *supra*.) Discussing the procedure of constitutional amendment, Story said (Commentaries, 5th Ed., Vol. II, p. 600) : "Time is thus allowed and ample time for deliberation, both in proposing and ratifying

Senator Winfield and Mr. O'Conor argued specifically that the power to withdraw a ratification was necessary to prevent adoption of an outdated amendment by the supplementary action of a few States.

New Jersey and Ohio purported to withdraw their ratifications of the Fourteenth Amendment (see p. 15, *supra*), and New York its ratification of the Fifteenth (16 Stat. 1131). The inclusion of these States, particularly the first two, in the list of ratifying States is, of course, a consideration weighing against the validity of the withdrawals; but, unlike the case of the States which first rejected and then ratified the Fourteenth Amendment, the exclusion of these States would not deprive the amendments of the necessary three-fourths majority, though in respect of the Fourteenth Amendment it would move forward the date of adoption. See Note, 30 American Law Review 894.

The following writers take the view that a ratification cannot be rescinded: Jameson, pp. 630-633; Ames, p. 229; Burdick, pp. 43-44; Watson, p. 1318; Willoughby, pp. 593-594; Dodd, 30 Yale Law Journal at 347; Garrett, 7 Tennessee Law Review at 294; Miller, 60 American Law Review at 182; Wheeler, 20 Case and Comment at 548; Compare Orfield, 25 Illinois Law Review at 439. (all *supra*, p. 21); See also Cockerell, J., dissenting in *Crawford v. Gilchrist*, 64 Fla. 41, 63-64.

amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action.”¹⁸

The omission by Congress of a time limit for ratification of the Child Labor Amendment was not inadvertent. In the House, proposals to insert a time limit of five years and seven years, respectively, were voted down (65 Congressional Record 7289, 7293, 7294). In the Senate a proposal for a five-year limit was likewise defeated (*idem.*, p. 10141).

In the light of this background the history of the amendment in the States can be considered. We examine first the record of ratifications by sessions. One State ratified in 1924, 3 in 1925, none in 1926, one in 1927, none from 1928 through 1930, one in 1931, none in 1932, 14 in 1933, none in 1934, 4 in 1935, one in 1936, and 3 in 1937. The ratification by Colorado in 1931 occurred in the seventh year after submission. It cannot be disputed that that ratification was timely, in view of the direct holding in *Dillon v. Gloss, supra*, and in view of the rejection by Congress of time limits of 5 and 7 years for the Amendment. The Amendment was not dead in 1931, and it is equally clear that it

¹⁸ In 1873 the Ohio legislature adopted a resolution ratifying the second amendment proposed in 1789, dealing with the compensation of members of Congress, which was never adopted by the requisite majority of States. See Ohio Acts, 1873, p. 409.

did not expire thereafter. In 1923, the year during which the legislatures of most States held their next regular session after the ratification of Colorado, there was a ferment of activity concerning the Amendment, resulting, as has been indicated, in 14 ratifications during the year. Since that time there has been unbroken progress in the State legislatures toward securing the necessary ratifications. At what time, then, can it be said that the amendment lapsed?

A more detailed chronology will make the point even clearer. While it is true that there was only one ratification from 1927 through 1930, and only one in 1931-1932, those years were not as barren of interest in the Amendment as those figures standing alone might suggest. The fact is that in every odd-numbered year resolutions to ratify the Amendment were introduced in a substantial number of state legislatures. In 1927 such resolutions were introduced in 11 States; in 1929, in 9 States; in 1931, in 7 States. It is significant, moreover, from the standpoint of determining whether at present a consensus of ratifying States exists, that no State which ratified has proposed to withdraw, while 8 States which affirmatively rejected have subsequently ratified. See Appendix A and B, *infra*.^{12a} Indeed, two of the earliest States to rat-

^{12a} Indiana, Kansas, Kentucky, Maine, Minnesota, New Hampshire, Pennsylvania, Utah. In addition, Oklahoma, Washington, and West Virginia ratified after one house voted to reject and the other voted against ratification.

ify, Arkansas and California, memorialized the President in 1937, through their legislatures, to continue his efforts for ratification. Ark. L. 1937, p. 1422; Calif. L. 1937, p. 2696.

Not only the States, but the National Government as well, have unhesitatingly treated the Amendment as still pending. At the last session of Congress the Interstate Commerce Committee of the Senate, reporting favorably the Wheeler Bill (S. 2226) to regulate the products of child labor in interstate commerce, made the following statement in regard to the pending Amendment (Senate Report 726, 75th Cong., 1st Sess.):

With but one or two exceptions neither those appearing before the committee nor the members of the Committee on Interstate Commerce expressed any feeling or fear that the enactment of child-labor legislation at this time would retard the adoption of the pending child-labor amendment. And neither the authors of the bill nor the Committee on Interstate Commerce feel that passage and approval of child-labor legislation reported at this time would eliminate the necessity for adoption of the child-labor amendment.

At the same session the Committee on the Judiciary, reporting favorably the resolution of Senator Vandenberg for a new amendment dealing with child labor, made it clear that the pending Amendment had not lapsed, but merely that in the opinion of the Committee it was not likely to be ratified by

the necessary majority of States (Senate Report 788, 75th Cong., 1st sess.). On January 8, 1937, the President addressed a letter to the Governor of each of the 19 nonratifying States whose legislatures were to meet in that year, urging them to press for ratification (New York Times, January 9, 1937, p. 5). Two days later former President Hoover issued a statement in which, emphasizing the continued need for the Amendment, he declared that it "should be passed now" (*idem*, January 11, 1937, p. 6).

It has not been suggested, nor could it be, that the conditions giving rise to the Amendment have been eliminated. The prevalence of child labor, the diversity of state laws and the disparity in their administration, and the resulting competitive inequities, are facts that exist today as they did in 1924. Cf. U. S. Dept. of Labor, Children's Bureau, *Child Labor—Facts and Figures* (Publ. No. 197, 1930, rev. ed. 1933); *id.*, *Summary of State Laws Affecting the Employment of Minors In Factories and Stores* (July 1938); *Trend of Child Labor 1927 to 1936* (Monthly Labor Rev., U. S. Dept. of Labor, Dec. 1937). It is not necessary here to detail these facts. A concise statement of them was made in 1935 by Mr. Charles C. Burlingham, Chairman of the National Non-Partisan Committee for Ratification of the Federal Child Labor Amendment. 21 A. B. A. J. 214. See also *White House Conference on Child Health and Protection*, Report of Subcommittee on Child Labor (1932), p. 31; *Recent*

Social Trends in the United States (Report of the President's Committee, 1933), Vol. 2, pp. 777-779. The authors of a recent study of child labor in the United States declare (Lumpkin and Douglas, *Child Workers in America*, 1937, p. IX): "The Child Labor Amendment, then, is the obvious step. No substitutes will do."¹⁴

A large number of other sources testify to the continued public support of the Amendment as a means of dealing with the persistent problem of child labor. Of particular interest is the record of the American Federation of Labor, which in every annual convention save one, from 1924 through 1937, has in the strongest terms urged ratification of the Amendment.¹⁵ The International Association of Governmental Labor Officials has persistently urged adoption of the Amendment,¹⁶ as has the National Conference for Labor Legislation.¹⁷ Many

¹⁴ See also Ireland, *Child Labor as a Relic of the Dark Ages* (1937), p. IX; "The defeat by the New York Assembly of the Child Labor Amendment, March 8, 1937, with its effect of seriously delaying the abolishment by Federal intervention of the evil of child enslavement still perpetrated in this free land, called for the completion of this book."

¹⁵ Report of Proceedings, 1924, pp. 207-212; 1925, pp. 284-285; 1926, p. 354; 1927, pp. 93, 409; 1928, pp. 312-313; 1929, p. 314; 1931, p. 348; 1932, pp. 73, 262; 1933, pp. 171, 311-315; 1934, pp. 470, 616; 1935, pp. 143, 174-175, 485, 490, 578; 1936, pp. 138, 243-244, 669; 1937, pp. 173, 503.

¹⁶ Proceedings of Convention, 1924, p. 121; 1925, p. 157; 1933, p. 167; 1934, p. 133; 1935, p. 184; 1936, p. 130.

¹⁷ Proceedings of First Conference, 1934, p. 78; Second Conference, 1935, pp. 69-70; Third Conference, 1936, p. 64; Fourth Conference, 1937, p. 108.

other representative organizations have steadfastly maintained their interest in, and support of, the Amendment. See National Child Labor Committee, *Handbook on Federal Child Labor Amendment* (1935). Two polls conducted by the American Institute of Public Opinion have dealt with the proposed Child Labor Amendment. The first, reported in May 1936, showed that of more than 130,000 voters representing a cross-section of public opinion, sixty-one percent favored the amendment; in forty-five States the vote was favorable.¹⁸ Nine months later, in February 1937, a second poll showed 76 percent favoring the Amendment; in every State the vote was favorable.¹⁹ Quite apart from the striking results of these polls, the very fact that they were conducted is indicative of the present vitality of the proposed Amendment.

If it be assumed that the courts can be asked to declare a proposed amendment lapsed at a time when States have believed it to be pending, there is at least no basis, in the light of all the foregoing facts, for reaching a conclusion contrary to that of the State legislatures with respect to the Child Labor Amendment.

III

THE JURISDICTION OF THIS COURT

The interest of the Government as amicus curiae is primarily in the decision of the constitutional

¹⁸ Washington Post, May 24, 1936.

¹⁹ Washington Post, February 24, 1937.

questions passed upon by the State courts. It may be appropriate, however, to state our position with respect to the question of the jurisdiction of this Court to review the decisions below. In our view the writs of certiorari were properly granted, and review of the decisions on the merits will involve no departure from established principles.

The Kentucky Case (No. 14)

It may be acknowledged at the outset that had this suit been brought in a Federal court it would properly have been dismissed on the ground that the complainants had no sufficient legal interest to challenge the constitutional validity of the ratifying resolution. Compare *Fairchild v. Hughes*, 258 U. S. 126;²⁶ The State court, however, entertained the suit and rendered judgment on the merits. That action does not present a Federal question. In the State courts the question whether a State officer may challenge the constitutionality of legislative or executive action is a matter of State practice to be decided by the courts of the State. See *Columbus and Greenville Railway Co. v. Miller*, 283 U. S. 96, 99, and cases there cited. The only question

²⁶ In *State of Ohio v. Cox, Governor*, 257 Fed. 334 (S. D. Ohio), the court dismissed a bill for an injunction to restrain the Governor from transmitting the proposed Eighteenth Amendment to the legislature. And in *Clements v. Roberts*, 144 Tenn. 129, 230 S. W. 30, the Supreme Court of Tennessee denied an injunction to restrain the Governor and other state officers from certifying and transmitting a resolution of ratification of the Nineteenth Amendment. Both of these decisions were rested chiefly on the doctrine of separation of powers.

before this Court is whether the petition for certiorari was a proper invocation of this Court's jurisdiction. In our view it was.

There can be no doubt that the decision of the Kentucky Court of Appeals falls within the terms of Section 237 (b) of the Judicial Code, as a final judgment in a cause "where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * * or commission held or authority exercised under, the United States." The defendants, petitioners here, claimed the privilege of carrying out their functions as public officers pursuant to an authority exercised under Article V of the Constitution. The validity of that exercise of authority was assailed by complainants. That the authority was exercised "under the United States" does not admit of dispute. This Court said, in *Leser v. Garnett*, 258 U. S. 130, 137: "But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; * * *." Statutory jurisdiction in this Court, then, clearly exists.

Thus the essential question is not strictly jurisdictional but relates rather to the standing of the petitioners to assert their claims in this Court. It is true that in a familiar series of cases this Court has hold that the interest of a party invoking its

jurisdiction and raising a question of constitutionality must be a personal, not an official, interest. *Smith v. Indiana*, 191 U. S. 138; *Braxton County Court v. West Virginia*, 208 U. S. 192; *Marshall v. Dye*, 231 U. S. 250; *Stewart v. Kansas City*, 239 U. S. 14. Those cases, like that at bar, arose in state courts, and the appellants in this Court were state officers. But those cases have no application here. The controlling factor in each of them was that the state officer was seeking to attack the validity of state action, not to support it. In the *Smith*, *Braxton County Court*, and *Stewart* cases, the appellant in this Court challenged the validity of a state statute, while in the *Marshall* case the appellant challenged the validity of the judgment of the state court itself under the constitutional guarantee of a republican form of government. In the case at bar, in contrast, the petitioners are seeking to sustain state action, and the state court has declared it invalid. In these circumstances there is no reason to deny standing to the petitioners in this Court. Similar cases have been entertained in recent terms with no question as to the standing of the publ' officers, whether Federal or state, to seek review: e. g., cases from state courts: *Kelly v. Washington ex rel. Foss Co.*, 302 U. S. 1; *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587; cases from three-judge Federal district courts: *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604; *Carmichael v. Southern Coal and Coke Co.*, 301

U. S. 495; *James v. Dravo Contracting Co.*, 302 U. S. 134; *South Carolina Highway Department v. Barnwell Bros.*, 303 U. S. 177; cases from circuit courts of appeals: *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Hurley v. Kincaid*, 285 U. S. 95. It seems unnecessary to discuss the point at greater length, particularly in view of the fact that it appears to have been settled by this Court in *Boynton, Attorney General v. Hutchinson Gas Co.*, 291 U. S. 656 (subsequently dismissed because of defects with respect to summons and severance, 292 U. S. 601). In that case, oral argument was ordered and had on the question of the standing of the Attorney General of a State to seek review of a state decision holding a state act unconstitutional. After argument and the submission of written briefs on the question of the standing of the petitioner a writ of certiorari was granted.²¹

As statutory jurisdiction exists, and the petitioners have standing to support the validity of the legislative action, the only remaining question is whether the cause is moot or academic. It is true that the action originally sought to be enjoined—the transmittal of the resolution to the Secretary of State of the United States—had already been performed. Nevertheless the prayer of the complainants was appropriately amended to ask that the Governor be required to revoke the notification.

²¹ The case is discussed in Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1936), Sec. 271, p. 498.

The court declined to issue a writ of the kind requested, on grounds of comity, but framed its decree to achieve the same end by causing it to be certified to the Secretary of State by the clerk of the lower court. It is not necessary, in order that there be an actual controversy, that process be issued against the defendant. *Fidelity National Bank v. Swope*, 274 U. S. 123. This Court itself has on occasion refrained from issuing mandatory process in the belief that its opinion would induce the action sought to be compelled. E. g., *Ex parte Northern Pacific Railway Co.*, 280 U. S. 142, 144; cf. 280 U. S. 530. The notice sent by the Clerk to the Secretary of State in the case at bar has served effectively to accomplish the purpose of the suit.

That purpose was not an academic one, either in law or in fact. It is true that the adoption of an amendment does not depend upon the proclamation of the Secretary of State or upon receipt by him of official notices of the ratifying resolutions. The adoption of an amendment occurs when the last of the necessary majority of States has acted. *Dillon v. Gloss*, 256 U. S. 368. But the notification to the Secretary of State is not in law an act of supererogation. Once official notice has been received by the Secretary that a state legislature has ratified a proposed amendment, the Secretary is precluded from going behind the notification to examine whether the procedural requisites obtaining in the State have been satisfied. *Leser v. Garnett*, 258 U. S. 130, 137. And the proclamation of the Sec-

retary, based on such official notice, is binding in this regard on the courts. *Ibid.*

Moreover, the statutory provision regarding official notice to the Secretary has genuine practical importance. It is designed to avoid uncertainty and confusion in the process of ratification. The provision was originally the Act of April 20, 1818, c. 80, Sec. 2, 3 Stat. 439, and was carried into the Revised Statutes as Section 205 (5 U. S. C. Sec. 160). That provision had an illuminating background. Shortly before it was enacted the House of Representatives found itself in ignorance of whether the so-called "title of nobility Amendment" proposed in 1810 had actually been ratified by three-fourths of the States. On February 6, 1818, the House received a report of the Secretary of State, pursuant to a House Resolution which had requested information "concerning ratification by the States of an article which is printed in some late copies of the Constitution, but which, it appears, has not yet officially received the sanction of three-fourths of the States in the Union" (31 Annals of Congress 865). The report of the Secretary showed that the article had been ratified by 12 States and rejected by 2, and that the action of 2 States had not been ascertained. The Secretary had addressed letters to the Governors of the latter two States but had not yet received replies (*ibid.*).²² It was in the light of this eminently

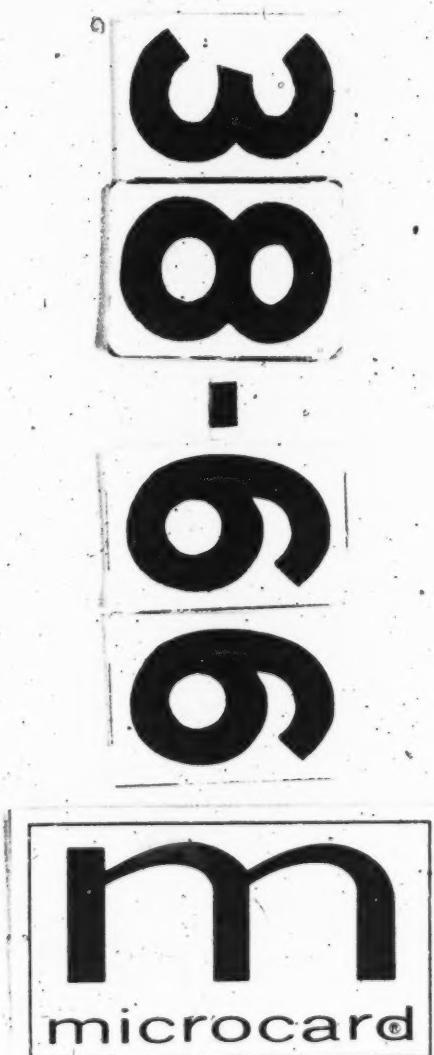
²² The "title of nobility Amendment" was likewise the subject of confusion in the States. In 1827 South Carolina adopted a resolution appointing a committee to ascertain

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practical situation that the Act of 1818 was enacted. The duty of the Secretary of State to declare the adoption of an amendment when "official notice" has been received from the requisite number of States implies a correlative duty on the part of the appropriate state officers to transmit official notice to the Secretary. It is submitted that the courts can not be asked to regard that duty as trivial or meaningless.

The failure of certain States to furnish official notice of their ratification of the Eleventh Amendment caused a misunderstanding as to the effective date of that Amendment to persist until 1935. On April 15, 1935, the Department of State was able to explain and correct the long-standing error, in the following statement:

President John Adams in a message to Congress of January 8, 1798, announced that the Eleventh Amendment to the Constitution had been adopted by three-fourths of

whether that State had ever acted upon, and accepted or rejected, the amendment, "it appearing to be uncertain whether it has been accepted by a constitutional majority of the States * * *" (S. C. R. and R. 1827, p. 66). See also *idem.*, 1829, p. 27, for a subsequent resolution of the same tenor. As late as 1841 the Indiana House adopted a resolution directing a committee to inquire why it was that the "title of nobility Amendment" "was incorporated in the last revision of the laws of Indiana as being a part of said Constitution; * * *." (H. J. 1841, pp. 292, 367).

For the information contained in this footnote, and for other valuable assistance in assembling historical data, we are indebted to Professor W. S. Jenkins, of the University of North Carolina.

the States and "may now be declared to be a part of the Constitution."

In the absence of more specific statement, and also (and particularly) because of the incompleteness of the records for the period in the Department of State, it has heretofore been generally supposed by the writers and other authorities on constitutional history that the effective date of the Eleventh Amendment was either the date of the presidential message, January 8, 1798, or some date shortly prior thereto.

As a result of recent research in the Department, it is now established that the Eleventh Amendment became part of the Constitution on February 7, 1795, for on that date it had been ratified by twelve States as follows:

* * * * *

The reason why it was not known at the seat of Government (then Philadelphia) until nearly three years thereafter that the Eleventh Amendment had been ratified by the necessary number of States was that some of the State authorities failed to give notice of the action of their Legislatures. * * *

(Dept. of State Press Release, April 15, 1938).

It is true that knowledge of the ratifications of state legislatures may be more easily acquired at the present day than a century ago. But it must be remembered that in the view taken by the complainants and the court below, it is necessary to know not merely the acts of ratification but also acts of rejection. The latter are, of course, less easily as-

certained, particularly if the concept of rejection includes the defeat of a resolution of ratification in the legislature. It would hardly be suggested that interference with official notice of rejection would constitute an actual controversy but that interference with official notice of ratification does not.

We therefore submit that an interference with notification to the Secretary of State is substantial, both as a matter of law and as a matter of fact, and that the case does not present a merely academic question.

Indeed if there be any difficulty in this regard it would seem to be presented by the possibility that the Court should declare the interference with the function of the state officers to be in itself unconstitutional, apart from the validity of the ratifying resolution. It is believed, however, that the Court need not go so far. Whether the suit of the complainants and the judgment of the state court are an invalid interference with the amending process depends upon whether the purported ratification is a genuine or a spurious act under Article V. Pertinent in this connection is the decision in *Hawke v. Smith*, No. 2, 253 U. S. 231. That case involved the Nineteenth Amendment, which was then pending prior to adoption. The plaintiff sued in a state court to enjoin the Secretary of State of Ohio from expending money in printing ballots for the submission of a referendum on the question of the ratification which the state legislature had already made of the proposed

amendment. The Supreme Court of Ohio held that the referendum was proper and denied relief. On appeal to this Court the decree was reversed, the Court holding that the method of referendum was inadmissible under Article V. It will be observed that the plaintiff in that case was seeking to restrain what the State conceived to be a proper exercise of the amending function. This Court might therefore have held the suit to be an unlawful interference with the amending process, raising as it did a Federal question with respect to that process that it was not then necessary to decide. The question of the validity of the method of referendum would not become acute unless a double contingency occurred: a result in the referendum contrary to the action of the state legislature, and the ratification of the pending amendment by three-fourths of the States with Ohio as a necessary component of the three-fourths majority. Instead of holding that the suit was an improper interference with the amending process, or that the constitutional question was prematurely raised, this Court entertained the appeal and determined the merits. It seems to us that the case at bar presents less serious procedural issues than were present in *Hawke v. Smith*, No. 2.

The Kansas Case (No. 14)

The fact that in the Kansas case the petitioners in this Court are seeking to challenge the validity of the action of the legislature makes this case a more doubtful one than the Kentucky case from the point

of view of the standing to raise the constitutional issues. We wish to suggest, however, a possible ground upon which it may be determined that the case is properly here. At least two of the petitioners appear to have been members of the legislature of Kansas in 1925 when the amendment was rejected, and to have voted on that occasion for rejection. Their present suit may thus be regarded as an effort to vindicate and protect their votes against what is asserted to be an illegitimate countervailing vote in 1937. In this aspect their standing is akin to that of the complainants in *Leser v. Garnett*, 258 U. S. 130, who were held entitled as voters to maintain a suit to strike from the registration lists the names of women voters which they contended were placed on the lists pursuant to an invalid constitutional amendment. The right to vindicate and protect one's vote is a right which has been given broad scope in the decisions of this Court. Cf. *Smiley v. Holm*, 285 U. S. 355; *Nixon v. Herndon*, 273 U. S. 536; *Leser v. Garnett, supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Supreme Court of Kansas should be affirmed and that of the Court of Errors of Kentucky should be reversed.

ROBERT H. JACKSON,
Solicitor General.

PAUL A. FREUND,
Special Assistant to the Attorney General.

OCTOBER 1938.

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APPENDIX A

CHART SHOWING PROCEEDINGS IN STATE LEGISLATURES ON CHILD LABOR AMENDMENT (BY SESSIONS)

SYMBOLS

Ratification:

- R Resolution (or bill) for ratification; referred to committee, or reported out, or indefinitely postponed, or tabled, etc.
- Rp1 Resolution (or bill) for ratification passed in one House.
- Rd1 Resolution (or bill) for ratification defeated in one House.
- Rd2 Resolution (or bill) for ratification defeated in both Houses.

J. Resolution (or bill) for rejection:

- Jp1 Resolution (or bill) for rejection passed one House.
- Jp2 Resolution (or bill) for rejection passed both Houses.
- Jd1 Resolution (or bill) for rejection defeated in one House.
- Jd2 Resolution (or bill) for rejection defeated in both Houses.

Ref. Resolution (or bill) for referendum.

State	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937
Alabama										R				
Arizona	(*)													
Arkansas	(*)													
California	(*)													
Colorado	R		R		R		(*)							
Connecticut	Rd2				R									
Delaware	Rd2													
Florida	Jp2													
Georgia	Jp2			R										
Idaho	Rd1													
Illinois	Ref													
Indiana	Jp2													
Iowa	R													
Kansas	Jp2				R									
Kentucky														
Louisiana	Rd1		Jp2											
Maine			Jp2 Rd1											
Maryland				Jp2										
Massachusetts	Ref		Jp2											
Michigan			Jp1 R											
Minnesota			Jp2											
Mississippi			Rp1											
Missouri				(*)										
Montana			Rd1		Rd1									
Nebraska			Rp1		Rp1									
Nevada				Rd1										
New Hampshire			Jp2											
New Jersey			Ref p2											
New Mexico			Ref p2											
New York			Ref p1	R	R	R								
North Carolina	Jp2		Rd1											
North Dakota			Rd1											
Ohio			Rd1 Jp1		R									
Oklahoma			Rd1 Jp1											
Oregon			Rd1 Ref p1											
Pennsylvania	R		Jp2											
Rhode Island			Rd2											
South Carolina			Jp2											
South Dakota			Jp2		R									
Tennessee			Jp2											
Texas			Jp2		Rd1									
Utah			Jp2		Rd1									
Vermont			Jp2											
Virginia				Jp2										
Washington			Rd1 Jp1				R tie							
West Virginia			Rd1 Jp1		R			R						

Rd2 Resolution (or bill) for ratification defeated in both Houses.

Ref. Resolution (or bill) for referendum.

State	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937
Alabama							R			R				
Arizona	(*)													
Arkansas	(*)													
California	(*)													
Colorado	R		R		R	R	(*)							
Connecticut	Rd2										Rd2			
Delaware	Rd2										Rd1			
Florida	Jp2			R						Rd1				
Georgia	Jp2			R							R			
Idaho	Rd1										(*)			
Illinois	Ref													
Indiana	Jp2													
Iowa	R													
Kansas	Jp2				R						R			
Kentucky	Rd1		Jp2											
Louisiana		Jp2 Rd1												
Maine				Jp2										
Maryland														
Massachusetts	Ref	Jp2												
Michigan		Jp1 R												
Minnesota		Jp2												
Mississippi														
Missouri		Jp2												
Montana		Rp1		(*)										
Nebraska			Rd1		Rd1									
Nevada		Rd1		Jp2										
New Hampshire				Ref p2										
New Jersey				Ref p2										
New Mexico				Ref p1		R		R						
New York				R	R	R		R						
North Carolina	Jp2		Rd1											
North Dakota			Rd1											
Ohio			Rd1											
Oklahoma			Rd1 Jp1		R									
Oregon			Rd1 Ref p1			R		Rd1						
Pennsylvania			Jp2		Ref p2 (vetoed)		R		Rd1					
Rhode Island	R					Ref								
South Carolina		Jp2					R		R		R			
South Dakota		Rd2							Rd1		R			
Tennessee		Jp2							Rd1		Rd1			
Texas		Jp2		R					Rd1		Rd1			
Utah		Jp2		Rd1		R			Rd1		Rd1			
Vermont		Jp2							Rd1		Rd1			
Virginia			Jp2						Rd1		Rd1			
Washington		Rd1 Jp1		Jp2		R tie 1		R		Rd1				
West Virginia		Rd1 Jp1		R				R						
Wisconsin	(*)		R		R		R		Rp1		Rp1 Ref p1			
Wyoming			R						Rp1		Rp1 Ref p1			
Ratifications (annual)	1	3	0	1	0	0	0	1	0	14	0	4	1	3
Ratifications (cumulative)	1	4	4	5	5	5	5	6	6	20	20	24	25	28



APPENDIX B *

TABLE SHOWING PROCEEDINGS IN STATE LEGISLATURES ON CHILD LABOR AMENDMENT

Symbols: R = Resolution (or bill) to ratify
J = Resolution (or bill) to reject

Alabama:

1933. H. J. pp. 735, 828 (R.). Reported favorably,
p. 935.
1935. H. J. p. 2927 (R.).

Arizona:

1925. Acts, pp. 439-440 (Ratified).

Arkansas:

1924. Acts, pp. 78-79 (Ratified).
1925. S. J. p. 200 (Resol. expressing regret at ratification;
adopted).
H. J. p. 372 (*Id.* tabled).

California:

1925. Acts, p. 1019 (Ratified).

Colorado:

1925. H. J. p. 1303 (R. Indefinitely postponed).
S. J. p. 1125 (R. Indefinitely postponed).
1927. H. J. p. 376 (R. Without recommendation).
S. J. p. 1137 (R. Indefinitely postponed).
1929. H. J. p. 1157 (R. Favorable).
1931. Acts, p. 827 (Ratified).

Connecticut:

1925. H. J. p. 431 (R. defeated).
S. J. p. 379 (R. defeated).
1929. H. J. p. 564 (R. to committee; leave to withdraw).
1935. H. J. p. 273 (R.). *Id.* p. 855 (R. defeated).
S. J. p. 76 (R.). *Id.* p. 843 (R. defeated).
1937. H. J. p. 621 (R. defeated). *Id.* p. 760 (R. tabled).
S. J. p. 626 (R. passed).

* In compiling this table we have utilized the researches of Prof. W. S. Jenkins, of the University of North Carolina.

Delaware:

1925. H. J. p. 126 (R. defeated).

S. J. p. 90 (R. returned to House). *Id.* p. 109
(R. defeated). *Id.* pp. 70, 71 (J. to committee).

1935. H. J. 632 (R. defeated).

1937. H. J. p. 838 (R. defeated; reconsidered).

Florida:

1925. Acts, p. 575 (Rejected).

1933. S. J. p. 439 (R. reported adversely).

1935. H. J. p. 1465 (R. tabled).

1937. H. J. p. 124 (R. tabled).

Georgia:

1924. Acts, p. 827 (Rejected).

1927. H. J. p. 426 (R. read second time).

1935. H. J. p. 2482 (R. tabled).

1937. H. J. p. 2478 (R. reported favorably and read sec-
ond time).

Idaho:

1925. H. J. p. 194 (R. defeated).

1935. Acts, p. 372 (Ratified).

Illinois:

1925. H. J. p. 923 (Ref. tabled).

S. J. p. 778 (Message referred to committee).

1933. Acts, p. 1126 (Ratified).

Indiana:

1925. H. J. p. 801 (Rejected).

S. J. p. 325 (Indefinitely postponed and rejected).

1935. Acts, p. 1555 (Ratified).

Iowa:

1925. H. J. p. 591 (R. Indefinitely postponed).

1923. H. J. p. 875 (R. Indefinitely postponed).

S. J. p. 619 (R. to committee).

1933, extra sess. Acts, p. 345 (Ratified).

Kansas:

1925. Acts, p. 248 (Rejected).

1929. S. J. p. 303 (R. reported adversely).

1933. H. J. p. 352 (R. reported favorably).

1933. Spec. sess., H. J. p. 60 (R. adopted).

S. J. p. 71 (R. defeated).

1935. H. J. pp. 180, 210 (R. reported unfavorably; R. to
committee).

1937. S. C. Res. 3 (Ratified).

Kentucky:

1926. Acts, p. 1014 (Rejected).
 1934. H. J. p. 1863 (R. referred).
 S. J. p. 354 (R. to committee).
 1936. Extra. Acts, p. 186 (Ratified).

Louisiana:

1924. H. J. p. 672 (R. defeated).
 1934. H. J. p. 1094 (R. defeated).
 1936. H. J. p. 410 (R. defeated).

Maine:

1925. H. J. p. 742 (J. passed).
 S. J. p. 643 (J. passed); *id.* p. 622 (R. defeated).
 1933. Acts, p. 169 (Ratified).

Maryland:

1927. Acts, p. 1642 (Rejected).
 1933. H. J. p. 60 (R. to committee).
 1935. H. J. p. 502 (R. reported adversely); *id.* p. 677
 (S. J. R. to committee).
 S. J. p. 437 (R. passed).
 1937. H. J. p. 1512 (R. defeated).

Massachusetts:

1924. Acts, p. 565 (Referendum).
 1925. H. J. p. 349 (Rejected).
 S. J. p. 521 (Rejected).
 1933. H. J. p. 750 (Pet. for ratif. to committee).
 1934. H. J. p. 314 (Pet. for resolution declaring amendment no longer before General Court; leave to withdraw).
 1935. (Pet. for ratif. Leave to withdraw).
 1937. H. J. p. 91 (R. defeated).
 S. J. p. 627 (R. defeated).

Michigan:

1925. H. J. p. 185 (J. passed).
 S. J. p. 162 (J. returned to House, not passed).
 Id. p. 103 (R. to committee).
 1933. S. C. R. 45 (Ratified).

Minnesota:

1925. Acts, p. 787 (Rejected).
 1933. H. J. p. 532 (R. passed).
 S. J. p. 1451 (R. reported favorably; to calendar).
 1933. Extra sess. Acts, p. 116 (Ratified).

Mississippi:

1934. H. J. p. 462 (R. reported adversely). *Id.* pp. 463, 496 (S. C. R. reported adversely).
 S. J. p. 485 (R. passed).
 1936. S. J. p. 430 (R. reported adversely).

Missouri:

1925. H. J. p. 704 (Rejected).
 S. J. p. 777 (Rejected).
 1933. H. J. p. 142 (R. passed).
 1935. H. J. p. 618 (R. reported adversely).
 S. J. p. 1147 (R. reported adversely).
 1937. H. J. p. 766 (R. defeated).

Montana:

1925. H. J. p. 140 (R. passed).
 S. J. p. 214 (R. tabled).
 1927. Acts, p. 588 (Ratified).

Nebraska:

1925. H. J. p. 39 (Message referred).
 1927. H. J. p. 1450 (R. defeated).
 1929. H. J. p. 1278 (R. Indefinitely postponed).
 S. J. p. 1089 (R. passed).
 1935. H. J. p. 993 (R. defeated).
 1937. H. J. p. 992 (R. Indefinitely postponed).

Nevada:

1925. H. J. p. 45 (R. defeated).
 1927. H. J. p. 90 (R. passed).
 S. J. p. 70 (R. Indefinitely postponed).
 1929. H. J. p. 283 (R. to committee; discharge defeated).
 1935. H. J. p. 33 (R. passed).
 S. J. p. 88 (R. defeated). *Id.* p. 88 (Reconsideration lost).
 1937. Acts, p. 548 (Ratified).

New Hampshire:

1925. H. J. p. 402 (Rejected).
 S. J. p. 157 (Rejected).
 1933. H. J. p. 757 (R. passed).
 S. J. p. 394 (R. passed). (Ratified.)

New Jersey:

- 1925. H. J. p. 344 (R. to committee). *Id.* p. 901 (Referendum voted).
- S. J. p. 21 (R. to committee). *Id.* p. 109 (Referendum voted).
- 1932. H. J. p. 113 (R. to committee).
- 1933. H. J. p. 1089 (R. passed).
- S. J. p. 868 (R. passed). (Ratified.)

New Mexico:

- 1925. H. J. p. 60 (R. passed). *Id.* p. 106 (Referendum voted).
- S. J. pp. 41, 55 (R. to committee). *Id.* p. 52 (Referendum voted).
- 1937. H. J. R. 4 (Ratified).

New York:

- 1925. H. J. p. 117 (Referendum).
- S. J. p. 265 (R. to committee). *Id.* p. 498 (Referendum approved).
- 1926. H. J. p. 89 (R. to committee).
- 1927. H. J. p. 362 (R. to committee).
- 1928. H. J. p. 39 (R. to committee).
- 1931. H. J. p. 68 (R. to committee).
- 1933. H. J. p. 2464 (R. to committee; discharge defeated).
- 1933. Extra sess. H. J. p. 39 (R. to committee).
- S. J. p. 70 (R. to committee).
- 1934. H. J. pp. 55, 62 (R. to committee).
- S. J. p. 21 (R. to committee).
- 1935. H. J. p. 3398 (R. defeated).
- S. J. p. 14 (R. to committee).
- 1936. H. J. p. 35 (R. to committee).
- S. J. p. 223 (R. to committee).
- 1937. H. J. p. 868 (R. defeated).
- S. J. p. 131 (R. passed).

North Carolina:

- 1924. Extra sess. Acts, p. 184 (Rejected).
- 1935. H. J. p. 351 (R. defeated).
- 1937. H. J. p. 114 (R. tabled).
- S. J. p. 207 (R. reported adversely).

North Dakota:

- 1925. S. J. p. 152 (R. defeated).
- 1933. Acts, p. 429 (Ratified).

Ohio:

- 1925. H. J. p. 107 (R. defeated).
- S. J. p. 68 (R. to committee).
- 1931. S. J. p. 540 (R. reported favorably).
- 1933. Acts, p. 675 (Ratified).
- 1937. S. J. p. 394 (Resol. expressing oppos. to amend. to committee).

Oklahoma:

- 1925. H. J. p. 255 (R. defeated).
- S. J. p. 330 (J. passed).
- 1927. S. J. p. 1337 (R. reported favorably).
- 1933. Acts, p. 498 (Ratified).

Oregon:

- 1925. H. J. p. 298 (R. to committee); *id.* p. 394 (Ref. passed).
- S. J. p. 187 (R. defeated); *ibid.* (Ref. defeated).
- 1929. H. J. p. 297 (R. to committee).
- 1931. H. J. p. 309 (R. defeated).
- 1933. Acts, p. 894 (Ratified).

Pennsylvania:

- 1925. Acts, p. 840 (Rejected).
- 1927. H. J. p. 503 (Ref. passed).
- S. J. p. 174 (Ref. passed). *Id.* pp. 748-749 (Ref. vetoed).
- 1929. S. J. p. 689 (Ref.).
- 1933. H. J. p. 472 (R. to committee; discharge defeated).
- 1933. Extra sess. Acts, p. 104 (Ratified).

Rhode Island:

- 1924. H. J. p. 20 (R.).
- S. J. p. 3 (R.).
- 1933. H. J. p. 30 (R.).
- 1934. H. J. p. 37 (R.).
- 1935. S. J. p. 24 (R.).
- 1936. H. J. p. 41 (R.).

South Carolina:

1925. H. J. p. 86 (J. passed).
 S. J. p. 98 (J. passed).
 1934. H. J. p. 307 (R. to committee).
 1935. H. J. p. 1981 (R. to committee; resolving clause struck out).
 1937. H. J. p. 1926 (Ref. passed).
 S. J. p. 1177 (Ref.).

South Dakota:

1925. H. J. p. 307 (R. defeated).
 S. J. p. 157 (R. defeated).
 1933. H. J. p. 74 (R. defeated).
 1935. H. J. p. 731 (R. defeated).
 S. J. p. 597 (R. indef. postponed).
 1937. S. J. p. 459 (R. reported without recommendation).

Tennessee:

1925. H. J. p. 342 (J. passed).
 S. J. p. 263 (J. passed).
 1933. H. J. p. 1005 (R. defeated).
 1937. H. J. p. 1160 (R. defeated).

Texas:

1925. Acts, p. 685 (Rejected).
 1927. S. J. p. 682 (R. reported adversely).
 1933. H. J. p. 1194 (R. defeated).
 1934, 2d call sess. H. J. p. 51 (R. passed).
 S. J. p. 54 (R. defeated).
 1935. H. J. p. 322 (R. reported favorably).
 1937. H. J. p. 303 (R. defeated).
 S. J. p. 96 (R. passed).

Utah:

1925. Acts, p. 299 (Rejected).
 1927. H. J. p. 253 (R. defeated).
 1929. H. J. p. 666 (R. reported adversely).
 1933. Spec. sess. H. J. p. 235 (R. passed).
 S. J. p. 212 (R. defeated).
 1935. Acts, p. 255 (Ratified).

Vermont:

1925. H. J. p. 203 (J. passed).
 S. J. p. 211 (J. passed).
 1935. H. J. p. 229 (R. defeated).

Virginia:

1926. Acts, p. 3 (Rejected).
 1934. S. J. p. 362 (R. defeated).

Washington:

1925. H. J. p. 68 (R. defeated); *id.* p. 69 (J. tabled).
 S. J. p. 91 (R. tabled); *id.* p. 90 (J. passed).
 1929. S. J. p. 299 (R. tie vote).
 1931. S. J. p. 69 (R. to committee).
 1933. Acts, p. 945 (Ratified).

West Virginia:

1925. H. J. p. 656 (J. passed); *ibid.* (R. out of order).
 S. J. p. 586 (J. defeated); *ibid.* (R. defeated).
 1927. H. J. p. 165 (R. to committee).
 1931. H. J. p. 225 (R. to committee).
 S. J. p. 156 (R.).
 1933. Extra sess. H. J. p. 485 (R. passed).
 S. J. p. 285 (R. to committee).
 1933. Second extra sess., Acts, p. 581 (Ratified).

Wisconsin:

1925. Acts, p. 690 (Ratified).
 1933. H. J. p. 1318 (Memorializing the legislatures to
 ratify; passed).
 S. J. p. 1255 (*Id.*, defeated).

Wyoming:

1925. H. J. p. 51 (R. indef. postponed).
 S. J. p. 44 (R. indef. postponed).
 1927. S. J. p. 129 (R. indef. postponed).
 1929. S. J. p. 258 (R. indef. postponed).
 1931. H. J. p. 231 (R. passed).
 S. J. p. 280 (R. indef. postponed).
 1933. H. J. p. 86 (R. indef. postponed).
 1933. Spec. sess. H. J. p. 281 (R. passed).
 S. J. p. 252 (R. indef. postponed); *id.* p. 291
 (Ref. passed).
 1935. Acts, p. 206 (Ratified).

APPENDIX C

1.

PROCLAMATION OF JULY 20, 1868, CONDITIONALLY DECLARING ADOPTION OF FOURTEENTH AMENDMENT

WILLIAM H. SEWARD,

Secretary of State of the United States.

To all to whom these presents may come, greeting:

Whereas the Congress of the United States on or about the sixteenth of June, in the year one thousand eight hundred and sixty-six, passed a resolution which is in the words and figures following, to wit:

Joint Resolution Proposing an Amendment to the Constitution of the United States

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring), That the following article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid as part of the Constitution, namely:

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice

President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

LA FAYETTE S. FOSTER,
President of the Senate pro tempore.

Attest:

EDWD. MCPHERSON,

Clerk of the House of Representatives.

J. W. FORNEY,

Secretary of the Senate.

And whereas by the second section of the act of Congress, approved the twentieth of April, one thousand eight hundred and eighteen, entitled "An act to provide for the publication of the laws of the United States and for other purposes," it is made the duty of the Secretary of State for ~~with~~ to cause any amendment to the Constitution of the United States which has been adopted according to the provisions of the said Constitution to be published in the newspapers authorized to promulgate the laws, with his certificate specifying the States by which the same may have been adopted, and that the same has become valid to all intents and purposes, as a part of the Constitution of the United States;

And whereas neither the act just quoted from nor any other law, expressly or by conclusive implication authorizes the Secretary of State to determine and decide doubtful questions as to the authenticity of the organization of State legislatures or as to the power of any State legislature to recall a previous act, or resolution of ratification of any amendment proposed to the Constitution;

And whereas it appears from official documents on file in this Department that the amendment to the Constitution of the United States proposed as aforesaid has been ratified by the legislatures of the States of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, and Iowa;

And whereas it further appears from documents on file in this Department that the amendment to the Constitution of the United States proposed as aforesaid has also been ratified by newly constituted and newly established bodies avowing themselves to be, and acting as the legislatures respectively of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama;

And whereas it further appears from official documents on file in this Department that the legislatures of two of the States first above enumerated, to wit, Ohio and New Jersey, have since passed resolutions respectively withdrawing the consent of each of said States to the aforesaid amendment, and whereas it is deemed a matter of doubt

and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual for withdrawing the consent of the said two States or of either of them to the aforesaid amendment;

And whereas the whole number of States in the United States is thirty-seven, to wit: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Vermont, Kentucky, Tennessee, Ohio, Louisiana, Indiana, Mississippi, Illinois, Alabama, Maine, Missouri, Arkansas, Michigan, Florida, Texas, Iowa, Wisconsin, Minnesota, California, Oregon, Kansas, West Virginia, Nevada, and Nebraska;

And whereas the twenty-three States first hereinbefore named whose legislatures have ratified the said proposed amendment, and the six States next thereafter named, as having ratified the said proposed amendment by newly constituted and established legislative bodies, together constitute three-fourths of the whole number of States in the United States;

Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress approved the twentieth of April, eighteen hundred and eighteen, hereinbefore cited, do hereby certify that, if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned and so has become valid to all intents and purposes as a part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the City of Washington this twentieth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

[SEAL]

WILLIAM H. SEWARD,

Secretary of State.

PROCLAMATION OF JULY 28, 1868, DECLARING ADOPTION OF
FOURTEENTH AMENDMENT

WILLIAM H. SEWARD,
Secretary of State of the United States.

To all to whom these presents may come, Greeting:

Whereas by an Act of Congress passed on the twentieth of April, one thousand eight hundred and eighteen, entitled "An Act to provide for the publication of the laws of the United States and for other purposes" it is declared, that whenever official notice shall have been received at the Department of State that any amendment which heretofore has been and hereafter may be proposed to the Constitution of the United States has been adopted according to the provisions of the Constitution, it shall be the duty of the said Secretary of State forthwith to cause the said amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid to all intents and purposes as a part of the Constitution of the United States.

And whereas the Congress of the United States, on or about the sixteenth day of June, one thousand eight hundred and sixty-six, submitted to the legislatures of the several States a proposed amendment to the Constitution in the following words, to wit:

Joint Resolution proposing an Amendment to the Constitution of the United States

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring), That the following article be proposed to the Legislatures of the several States, as an amendment to the Constitution of the United States, which when ratified by three-fourths of said Legislatures, shall be valid as part of the Constitution, namely:

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But

neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SCHUYLER COLFAX,

Speaker of the House of Representatives.

LA FAYETTE S. FOSTER,

President of the Senate pro tempore.

Attest:

EDWD. MCPHERSON,

Clerk of the House of Representatives.

J. W. FORNEY,

Secretary of the Senate.

And whereas the Senate and House of Representatives of the Congress of the United States on the twenty-first day of July, one thousand eight hundred and sixty-eight, adopted and transmitted to the Department of State a concurrent resolution, which concurrent resolution is in the words and figures following, to wit:

In Senate of the United States, July 21, 1868

Whereas the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, West Virginia, Kansas, Missouri, Indiana, Ohio, Illinois, Minnesota, New York, Wisconsin, Pennsylvania, Rhode Island, Michigan, Nevada, New Hampshire, Massachusetts, Nebraska, Maine, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two thirds of each House of the thirty-ninth Congress; therefore . . .

Resolved by the Senate (the House of Representatives concurring) that said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it

shall be duly promulgated as such by the Secretary of State.

Attest:

GEO. C. GORHAM,
Secretary.

In the House of Representatives, July 21, 1868

Resolved, That the House of Representatives concur in the foregoing Concurrent Resolution of the Senate declaring the ratification of the fourteenth article of amendment of the Constitution of the United States.

Attest:

EDWD. MCPHERSON,

Clerk.

And whereas official notice has been received at the Department of State that the legislatures of the several States next hereinafter named, have, at the times respectively herein mentioned taken the proceedings hereinafter recited upon or in relation to the ratification of the said proposed Amendment, called Article fourteenth namely:

The legislature of Connecticut ratified the amendment June 30th, 1866; the legislature of New Hampshire ratified it July 7th, 1866; the legislature of Tennessee ratified it July 19th, 1866; the legislature of New Jersey ratified it September 11th, 1866, and the legislature of the same State passed a resolution in April 1868, to withdraw its consent to it; the legislature of Oregon ratified it September 19th, 1866; the legislature of Texas rejected it November 1st, 1866; the legislature of Vermont ratified it on or previous to November 9th, 1866; the legislature of Georgia rejected it November 13th, 1866; and the legislature of the same State ratified it July 21st, 1868; the legislature of North Carolina rejected it December 4th, 1866, and the legislature of the same State ratified it July 4th, 1868; the legislature of South Carolina rejected it December 20th, 1866, and the legislature of the same State ratified it July 9th, 1868; the legislature of Virginia rejected it January 9th, 1867; the legislature of Kentucky rejected it January 10th, 1867; the legislature of New York ratified it January 10th, 1867; the legislature of Ohio ratified it January 11th, 1867, and

the legislature of the same State passed a resolution in January 1868, to withdraw its consent to it; the legislature of Illinois ratified it January 15th, 1867; the legislature of West Virginia ratified it January 16th, 1867; the legislature of Kansas ratified it January 18th, 1867; the legislature of Maine ratified it January 19th, 1867; the legislature of Nevada ratified it January 22d, 1867; the legislature of Missouri ratified it on or previous to January 26th, 1867; the legislature of Indiana ratified it January 29th, 1867; the legislature of Minnesota ratified it February 1st, 1867; the legislature of Rhode Island ratified it February 7th, 1867; the legislature of Delaware rejected it February 7th, 1867; the legislature of Wisconsin ratified it February 13th, 1867; the legislature of Pennsylvania ratified it February 13th, 1867; the legislature of Michigan ratified it February 15th, 1867; the legislature of Massachusetts ratified it March 20th, 1867; the legislature of Maryland rejected it March 23rd, 1867; the legislature of Nebraska ratified it June 15th, 1867; the legislature of Iowa ratified it April 3d, 1868; the legislature of Arkansas ratified it April 6th, 1868; the legislature of Florida ratified it June 9th, 1868; the legislature of Louisiana ratified it July 9th, 1868; and the legislature of Alabama ratified it July 13th, 1868:

Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, in execution of the aforesaid act, and of the aforesaid concurrent resolution of the 21st of July, 1868, and in conformance thereto, do hereby direct the said proposed amendment to the Constitution of the United States to be published in the newspapers authorized to promulgate the laws of the United States, and I do hereby certify that the said proposed amendment has been adopted in the manner hereinbefore mentioned, by the States specified in the said concurrent resolution, namely, the States of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Louisiana, South Carolina, Alabama, and also by the legislature of the State of

Georgia; the States thus specified being more than three-fourths of the States of the United States.

And I do further certify that the said amendment has become valid to all intents and purposes as a part of the Constitution of the United States.

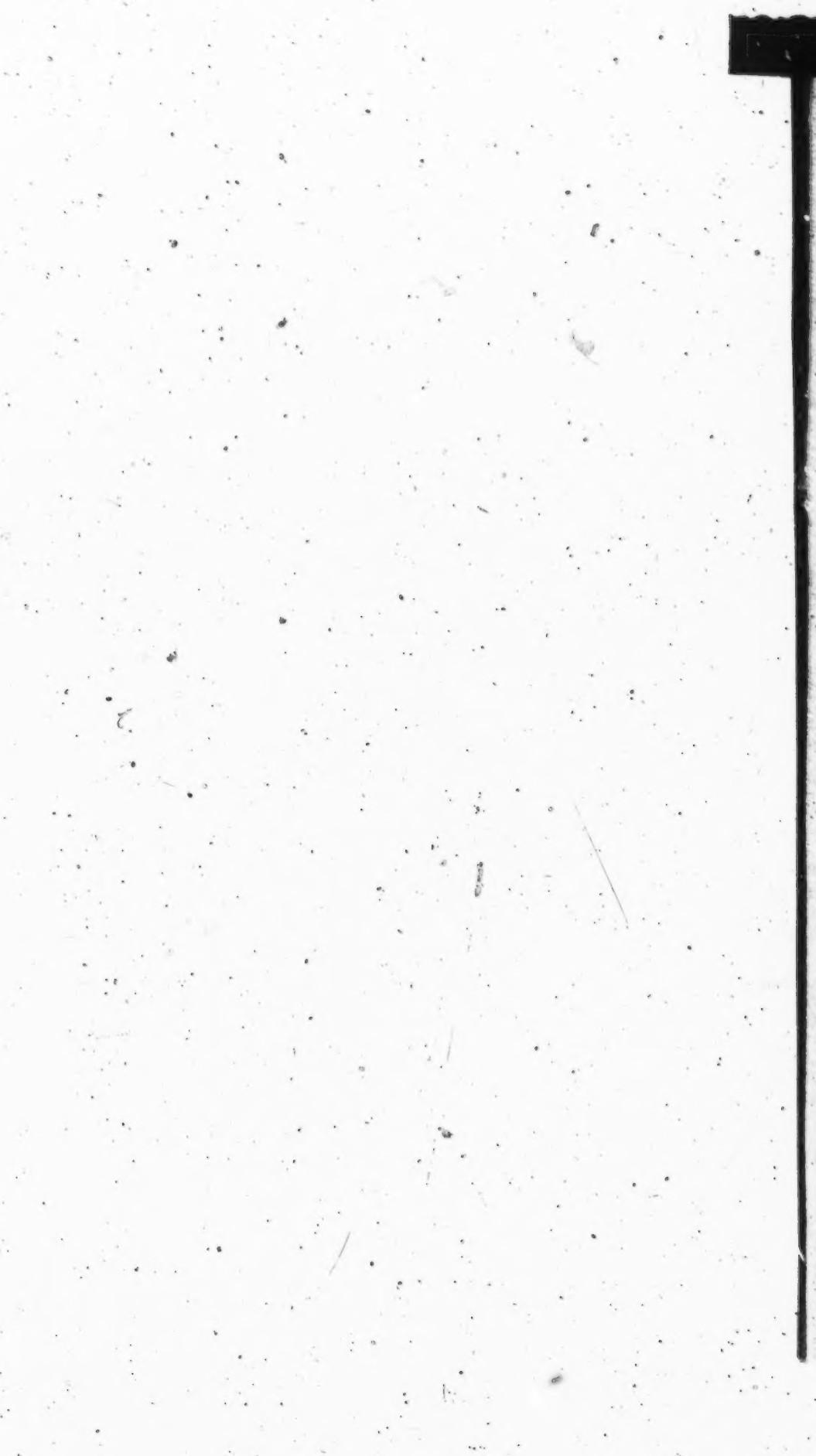
In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the City of Washington this twenty-eighth day of July, in the year of our Lord, one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

[SEAL]

WILLIAM H. SEWARD,
Secretary of State.





FILE COPY

U. S. Supreme Court, U. S.
APRIL 15 1939
SPECIAL

No. 7, 14

RECORDED CLERK'S OFFICE
SUPREME COURT OF THE UNITED STATES

EX-100

In the Supreme Court of the United States

October Term, 1938

ROLLA W. COLEMAN, W. A. BARROW, CLARENCE O.
BRABNER, ET AL., PETITIONERS

v.

CLARENCE W. MOLLE, AS SECRETARY OF THE SENATE
OF THE STATE OF KANSAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
KANSAS

ALBERT BENJAMIN O'HANDLER, INDIVIDUALLY AND
AS GOVERNOR OF THE COMMONWEALTH OF KEN-
TUCKY, ET AL., PETITIONERS

v.

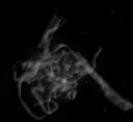
JAMES W. WISE AND RAY B. MOSS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
KENTUCKY

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES
AMICUS CURIAE

15

19



In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 7

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C.
BRADNEY, ET AL., PETITIONERS

v.

CLARENCE W. MILLER, AS SECRETARY OF THE SENATE
OF THE STATE OF KANSAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
KANSAS

No. 14

ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND
AS GOVERNOR OF THE COMMONWEALTH OF KEN-
TUCKY, ET AL., PETITIONERS

v.

JAMES W. WISE AND RAY B. MOSS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
KENTUCKY

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES
AMICUS CURIAE

This memorandum will be confined to two ques-
tions: (1) the jurisdiction of this Court, discussed

(1)

in our original brief at pages 33-44; and (2) the right of the Lieutenant Governor of Kansas to cast a deciding vote in the State Senate, a question not discussed in our original brief.

I

In the Kansas case (No. 7) it is submitted that the petitioners have no standing to challenge the right of the State to ratify the proposed Amendment and have its vote recorded with the Secretary of State of the United States. The petitioners in that case lack the personal interest which is a prerequisite to an attack in a Federal court on the legislative or other official acts of a State. See our original brief, page 36, and cases there cited. The Kansas case is a particularly appropriate one for the application of this principle, since the petitioners are seeking relief which would fetter the amending process as the State conceives it, and which is unnecessary to the safeguarding of any right or privilege. If the decision of the Kansas court is allowed to stand, and the resolution of ratification is accordingly enrolled and notice is sent to the Secretary of State, the Federal questions now sought to be raised will not be foreclosed. Insofar as these questions are justiciable at all, they can be presented for decision when and if their solution becomes germane to some actual controversy. It is wholly conjectural to assume at the present time that such a controversy will arise. Possibly the Amendment will not be ratified by 36 States; or, if

so ratified, the action of Kansas may not be decisive with respect to the adoption of the Amendment; or, if the question does become decisive, the contention that there was no power in the State to ratify, or that the ratifying body was not the legislature, may be presented and decided in a proper case, with review in this court. The Kansas case thus appears as an effort to anticipate important issues of constitutional law, at the instance of parties whose own necessities do not call for a decision.¹

With respect to the question of the power of the Lieutenant Governor, the problem of jurisdiction is probably to be viewed somewhat differently, though with the same result. If the resolution is enrolled and notice sent to the Secretary of State, the opportunity of members of the legislature to question the regularity of the vote will probably have been lost, insofar as the matter is one of state law and practice. *Cf. Leser v. Garnett*, 258 U. S.

¹ The suggestion was made in our original brief (p. 44) that jurisdiction in the Kansas case might possibly be rested on the fact that at least two of the petitioners appear to have been members of the legislature in 1925, when the vote of rejection occurred, and to have voted for rejection, and that hence their present petition may be viewed as an attempt to vindicate their prior vote as against what is asserted to be an illegitimate countervailing vote in 1937. Aside from the question whether these facts would present a case of threatened infringement of rights warranting intervention by this Court, the facts are not disclosed or relied on in the record, and hence a Federal claim based thereon has probably not been asserted in the State court with sufficient definiteness and clarity to furnish a basis for review here.

130, 137. To the extent that it is a state question, there is, of course, no ground for review in this Court in any event. And insofar as the matter may present a Federal question, turning on the meaning of the term "legislature" in Article V, it will be no more foreclosed than any other Federal question sought to be raised in the case.

The Kentucky case (No. 14), it is submitted, stands on an entirely different footing. As we endeavored to point out in our original brief (pages 35-43), the Governor, petitioner here, is seeking to exercise an authority under the Constitution and laws of the United States; the respondents have sought to interfere with the exercise of that authority by preventing official notice of the action of Kentucky from reaching the Secretary of State—an interference which would have important legal as well as practical consequences; and the relief actually granted constitutes just as effective an interference, clouding if not wholly nullifying the notice theretofore received by the Secretary of State from the Governor.² We shall not repeat

2. In insisting on the interest of petitioners in having the notice of ratification free from interference, our position is not inconsistent with our contention that the petitioners in the Kansas case have no interest in preventing the notice from being sent. In the Kentucky case the petitioners are entitled, in carrying out a Federal function, to protection against any impairment of the exercise of that function. In the Kansas case the petitioners' only possible interest is in vindicating the prior vote of rejection or in excusing the vote of the Lieutenant Governor, and neither of these interests, insofar as they present Federal questions, would be prejudiced by the notice of ratification.

here the discussion of these points contained in our original brief.

The substantial question in the Kentucky case, it is believed, is not the jurisdiction of this Court to review the action of the State court, but is rather the scope of that review—whether the judgment below should be reversed because it constitutes an unwarranted interference with an officer acting at the very least under color of federal authority, or whether the judgment should be reversed only if the Court, upon consideration of the substantive federal questions, concludes that the defendants were engaged in a valid exercise of the power of ratification. Either of these alternatives would appear to be tenable.

With respect to the first alternative, under which it would be unnecessary to consider the validity of the resolution of ratification, it is to be emphasized that the present case is one of the control by a state court over defendants who claim to be performing federal functions, where no private rights are being threatened or infringed, and where, consequently, a federal court would be powerless to act for want of an actual controversy. It is questionable whether the autonomy of state courts in respect of their own procedure and jurisdiction extends thus far. At an early date it was insisted that since the use and scope of the writ of mandamus in a state court was a matter properly within the authority of that court, the writ could issue against a federal officer to compel the discharge of his duties; but the

argument did not prevail with this Court, which pointed out that not even the inferior federal courts had been vested with such control over federal officers, and that in this class of cases the autonomy of the state courts must yield. *McClung v. Silliman*, 6 Wheat. 598. So in the present case there is ground for concluding that where no private rights require the protection of a court, the State courts are not vested with authority beyond that of the federal courts to control the performance of federal functions. Doubtless Congress could expressly have so provided. Compare *In re Neagle*, 135 U. S. 1. The conclusion would be clearer if Congress had spoken, or in the absence of Congressional legislation, if the acts of the defendants were unquestionably done in the performance of valid federal functions and not, as here, challenged as spurious. In view of these latter considerations it would perhaps be the more appropriate course for this Court to set aside the action of the state court only if the challenged act of ratification is found to be a proper exercise of the amending power.

That the validity of the ratification should be considered by the Court is indicated by the decisions in *Hawke v. Smith*, No. 1, ²⁸³285 U. S. 221, and *Hawke v. Smith*, No. 2, 253 U. S. 231. In those cases the plaintiff, plaintiff in error in this Court, sought to enjoin the Secretary of State of Ohio from spending the public money in preparing and printing forms of ballot for submission of a refer-

endum on the question of the ratification which the legislature had theretofore made of the proposed Eighteenth and Nineteenth Amendments, respectively. In those cases the plaintiff established a pecuniary interest, albeit a slender one, in the prevention of the threatened action of the defendant, and the cases are therefore not strictly apposite here. Nevertheless, the Court in those cases might have decided that the interest of the plaintiff did not justify interference with the action of the Secretary of State under color of federal authority. The Court in fact passed on the merits of the plaintiff's contention that the referendum was an improper procedure for constitutional amendment, decided the issue in plaintiff's favor, and reversed and remanded the cause to the state court for further proceedings.

In the case at bar we think that a similar course is proper. The problem is one of adjusting the authority and independence of the state courts, on the one hand, and the protection of federal authority, on the other. This adjustment can fittingly be made by reviewing in this Court the merits of the conflicting contentions as to the validity of the act of ratification: If, as we contend, the ratification was valid, the interference with the federal function can be removed by reversal of the judgment. If, on the other hand, the ratification was invalid, there has been no genuine interference with the performance of a federal function.

II

If our argument that there is no jurisdiction to review the judgment in the Kansas case is sound, it is unnecessary to discuss the question of the authority of the Lieutenant Governor of Kansas to vote on the ratifying resolution. If, however, our argument on the issue of jurisdiction is not accepted, the following considerations are advanced in support of the view that the Lieutenant Governor did have authority to vote.

That he had authority as a matter of state law and practice has been settled by the decision of the Kansas court. The only Federal question is whether, as his vote was decisive in the Kansas Senate, the ratification was had by the "legislature" of the State within the meaning of Article V of the Federal Constitution. The term "legislature" as used in the Constitution means what it meant when the Constitution was adopted, and at that time a legislature was "the representative body which made the laws of the people." *Hawke v. Smith*, No. 1, 253 U. S. 221, 227; *Smiley v. Holm*, 285 U. S. 355, 365. At the time of the adoption of the Constitution the authority of a lieutenant governor to cast a deciding vote in the state senate was a familiar practice, and, indeed, the office of lieutenant governor furnished the model for the Vice Presidency. See *Federalist*, No. 68 (Hamilton); Luce, *Legislative Procedure*, pp. 445-464.

The authority of the Lieutenant Governor to participate in the vote of the Senate is thus not an innovation or a practice which might impair the constitutional concept of a legislature. The Lieutenant Governor, while not an "elected member" of the legislature within the meaning of the Kansas Constitution, is nevertheless a participant in the functions of the State Senate, quite apart from the function of ratification of constitutional amendments. In Kansas the Lieutenant Governor is not only the presiding officer of the Senate, but he appoints the standing committees, to which bills must be referred. Senate Rules, No. 21.

Apparently there would be no question of the right of the Lieutenant Governor to be considered part of the legislative body if his power to vote extended to the passage of bills and joint resolutions, that is, to positive lawmaking. The argument seems to be that since his right to vote is limited to the passage of concurrent resolutions, which are not used for positive lawmaking, he is not part of the body which "makes the laws." This argument, it is submitted, is fallacious, for it misconceives the nature of the ratifying function. Ratification of a proposed amendment is not a legislative function in the strict sense; if it were, the approval of the Governor would be required and in Kansas it could be carried out only by bill or joint resolution. For the same reason a referendum cannot be used to

express assent to a proposed amendment, though it can be used as part of the legislative process in relation to the redistricting of a state under Article I, Section 4, of the Constitution. *Hawke v. Smith*, *supra*, at 230-231. Precisely because ratification is not an act of lawmaking, the internal procedure appropriate for positive lawmaking by the legislature cannot be regarded as binding. Similarly, when state legislatures elected Senators under Article I, Section 3, of the Constitution, they did not act to make laws, and they were authorized by Congress itself to act in joint assembly where the separate houses failed to act or failed to choose the same person. R. S. Section 14.

These are matters of internal procedure. So long as the procedure is appropriate to the function, it cannot be said to be forbidden by the Federal Constitution. The use of a concurrent resolution, which carries with it the power of the Lieutenant Governor to cast a deciding vote, is the most appropriate procedure which could be employed for the passage of a ratifying resolution, which does not require the approval of the Governor, and hence there is no basis for concluding that because this procedure was employed the ratifying body ceased to be the legislature of the State.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

APRIL 1939.





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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1938

NO.

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ROLLA W. COLEMAN, W. A. BARRON, CLAUDE
C. BRADNEY, et al,

Petitioners,

v.

CLARENCE W. MILLER, AS SECRETARY OF
THE SENATE OF THE STATE OF KANSAS,
et al,

Respondents.

NO. 14

ALBERT BENJAMIN CHANDLER, Individually
and as Governor of the Commonwealth of Ken-
tucky, et al,

Petitioners,

v.

JAMES W. WISE and RAY B. MOSS,

Respondents.

**BRIEF AMICUS CURIAE FILED ON
BEHALF OF THE STATE OF WISCONSIN**

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MAYER PRINTING CO., MADISON, WIS.



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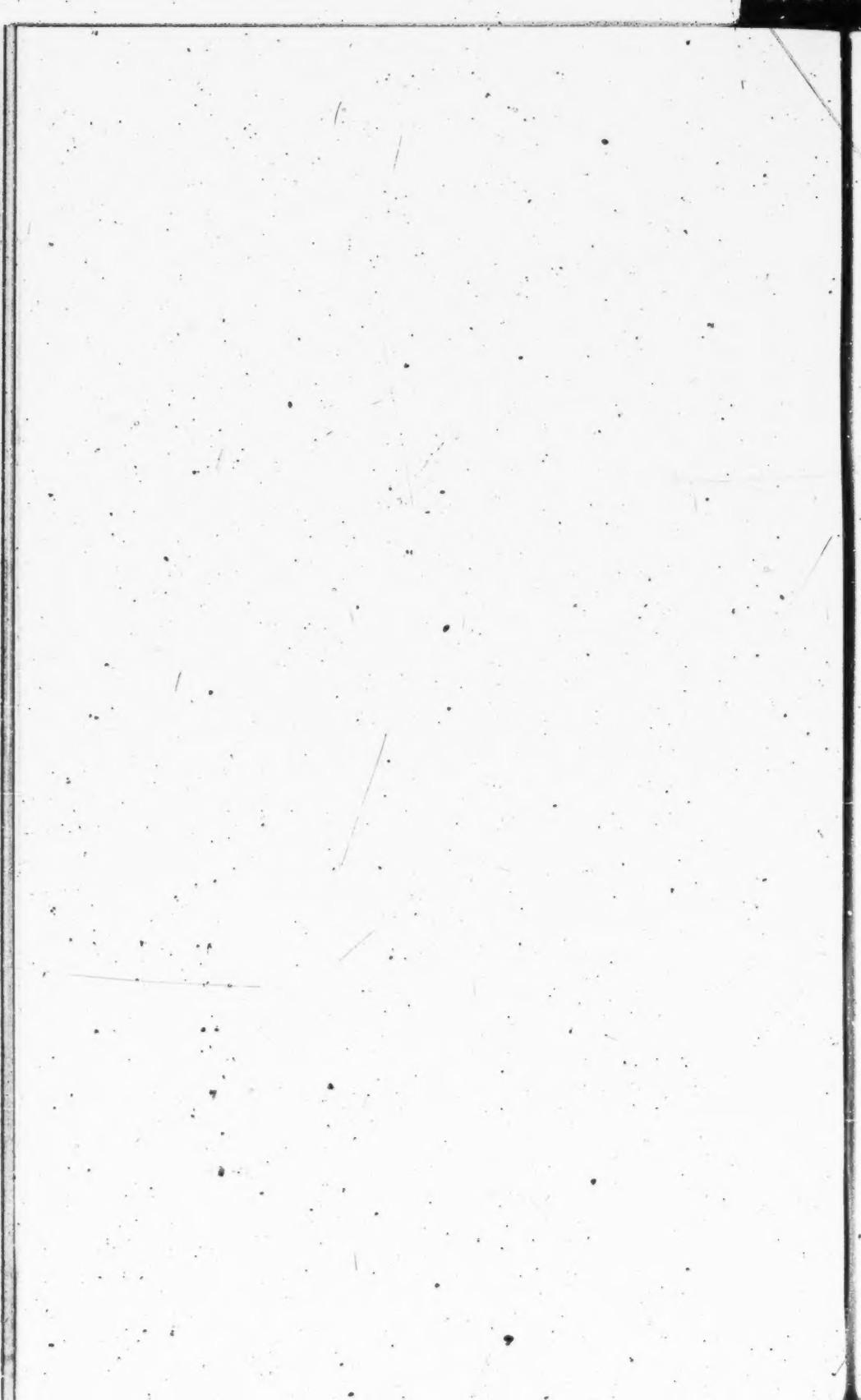
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Supreme Court of the United States

OCTOBER TERM, 1938

NO. 796

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE
C. BRADNEY, et al,

Petitioners,

v.

CLARENCE W. MIELER, AS SECRETARY OF
THE SENATE OF THE STATE OF KANSAS,
et al,

Respondents.

NO. 14

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and as Governor of the Commonwealth of Ken-
tucky, et al,

Petitioners,

v.

JAMES W. WISE and RAY B. MOSS,

Respondents.

BRIEF AMICUS CURIAE FILED ON
BEHALF OF THE STATE OF WISCONSIN

I. PRELIMINARY STATEMENT

These cases raise questions with respect to ratification of the proposed child labor amendment to the Constitution of the United States which are of vital interest to all of the states—those that have ratified the amendment as well

as those that have not. Wisconsin ratified the amendment in 1925 and was among the first four states to ratify, the other three being Arkansas in 1924 and Arizona and California in 1925.

II. ARGUMENT

SUMMARY OF ARGUMENT

The positions which we take with respect to questions raised by these appeals are:

Point I. Prior rejection by a legislature does not bar ratification by a subsequent legislature;

Point II. One time rejection of the amendment by thirteen states (one more than one-fourth) does not defeat the proposed amendment or render subsequent ratification nugatory;

Point III. The amendment has not lost its vitality by lapse of time.

Point I. Prior Rejection by a Legislature Does Not Bar Ratification by a Subsequent Legislature

A. *There is no language in Art. V of the constitution that justifies a contrary concept*

Art. V of the Constitution provides:

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments,

which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate."

The language of the Constitution is that the proposed amendment "shall be valid to all intents and purposes, as a part of this constitution, when *ratified* by the legislatures of three-fourths of the several states, * * *." It is not perceived how this language supports a contention that a legislature, having once rejected a proposed amendment, has exhausted its power so that that legislature and all subsequent legislatures of the same state are barred from subsequent ratification. The only action of a state legislature or convention of any significance with respect to ultimate adoption of the amendment by the several states is that of ratification.

An amendment becomes a part of the Constitution "when ratified by the legislatures of three-fourths of the several states." The power given by this language to ratify is absolute, unqualified and continuing and without any express or implied prohibition against ratification after having once rejected. The power of the states to ratify must be as broad as the language of the constitution that grants that power. Except as to the one limitation that ratification must be within a reasonable length of time, no reason is perceived why the power granted should be restricted when the Constitution does not purport to restrict or limit the exercise of the power to ratify.

The foregoing is the view supported by Jameson in his work on Constitutional Conventions, 4th ed., par. 581, as follows:

"To the conclusion, that rejection forms no barrier in the way of afterwards ratifying an amendment, it may be objected that it recognizes power in the States to ratify, but no power to reject a proposed amendment. This objection is specious, but it has no real foundation. To say that a State has no power to reject would be untrue; for it is an historical fact that, in point of form, many States have rejected amendments, and it would be puerile to contend that a right to pass upon a proposition does not involve a right either to reject or to ratify it. The real question here is what, under the Constitution, is the consequence of rejection? Does it, or does it not, as to the rejecting State, definitely settle the fate of the amendment? What we insist upon is, that a State has a right at some time to ratify an amendment submitted to it: That is precisely what is asked of it by Congress, and it is that which the Constitution empowers it to do. The authority charged with inspecting such votes, therefore, cannot refuse to receive one, certainly if offered within a reasonable time, until after a ratifying vote shall have been received." (pp. 629-630)

The Constitution does not say "when ratified by the legislatures of three-fourths of the several states" unless previously rejected by more than one-fourth of the several states. Had the framers of the Constitution intended such a result, it would have been a simple matter for them to have said so. That they did not say so should put the matter at rest. Such a result is not to be arrived at by interpolation. *United States v. Sprague*, 282 U. S. 716, 75 L. ed. 640, 51 Sup. Ct. 222 (1930).

B. *This position is supported by the history of the adoption of the fourteenth amendment*

The fourteenth amendment was adopted only by virtue of ratification subsequent to earlier rejections. Newly constituted legislatures in both North Carolina and South Carolina, respectively on July 4 and 9, 1868, ratified the proposed amendment, although earlier legislatures had rejected the proposal. The Secretary of State issued a proclamation which, though doubtful as to the effect of attempted withdrawals by Ohio and New Jersey, entertained no doubts as to the validity of the ratification by North and South Carolina. (15 Stat. 706.) The following day, July 21, 1868, Congress passed a resolution which declared the fourteenth amendment to be a part of the Constitution and directed the Secretary of State so to promulgate it. (15 Stat. 709.) The Secretary waited, however, until the newly constituted legislature of Georgia had ratified the amendment (15 Stat. 708), subsequent to an earlier rejection (15 Stat. 710), before the promulgation of the ratification of the new amendment. In the 66 years which have followed, in which the Fourteenth amendment has become the most bitterly litigated portion of the Constitution, none has doubted the validity of its ratification.

The situation with respect to this amendment at the time of its adoption by Congress and promulgation by the Secretary of State, was such that the necessary three-fourths did not exist without counting the ratifications of one or three of the states that had previously rejected—depending upon whether the attempted withdrawals of Ohio and New Jersey were effective—as there were twenty-five states that had ratified and which ratifications did not

involve any question of ratification after subsequent rejection or attempted withdrawal of ratification. Twenty-eight states constituted the necessary three-fourths.

1. The force of this precedent cannot be shaken or minimized by the reconstruction acts

The court of appeals of Kentucky in *Wise v. Chandler*, 270 Ky. 1, 108 S. W. (2d ser.) 1024, 1030 (1937), appraises the fourteenth amendment as a precedent as follows:

"So far as concerns the precedent set by Congress in connection with the adoption of the Fourteenth Amendment, its view is authority for the proposition that a State which has once ratified an amendment has exhausted its power and cannot thereafter reverse its stand. On the other hand, when it comes to the counting of the votes of Georgia and the two Carolinas, the avowed justification of this was not that those States could ratify despite their previous rejections, but that their previous rejections were void because the then governments of those States were illegal and their Legislatures were without authority to act at all."

There is no law, statute, enactment or proclamation that supports the statement of the court that the avowed justification for counting the votes of Georgia and the two Carolinas was that the prior action of rejection by the three legislatures was action by legislatures without authority.

The first reconstruction act, 14 Stat. 428, of March 2, 1867, provides:

"WHERAS no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Caro-

lina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established."

The act then goes on to set up military governments.

The act does not purport to render void all prior action of the legislatures of the states in question nor does it purport to be of any retroactive effect. It speaks of "now exists" and *in futuro*. It does not speak in the past.

Furthermore, this court has repeatedly held that the acts of the several confederate states "so far as they did not impair or tend to impair the supremacy of the national authority or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of the state of insurrection and war did not loosen the bonds of society or do away with civil government." *Horn v. Lockhart*, 17 Wall. 570 (1873).

See, also:

Johnson v. West India Transit Co., 156 U. S. 618, 645 (1895);

Texas v. White, 74 U. S. (7 Wall.) 700 (1868);

Keith v. Clark, 97 U. S. (7 Ottow) 454 (1878).

Finally, there is no intimation either in the resolution of Congress adopting the fourteenth amendment or in the proclamation of Secretary of State Seaward that even suggests or intimates that the justification for counting the votes of Carolina and Georgia was that the prior rejections were by legislatures that were without authority to act at all. The language of Secretary Seaward's proclamation with respect to these three states is not that of "purported rejection by a legislature without authority" but is as follows:

"* * * The legislature of Georgia rejected it November 13, 1866, and the legislature of the same state ratified it July 21, 1868; the legislature of North Carolina rejected it December 4, 1866, and the legislature of the same state ratified it July 4, 1868; the legislature of South Carolina rejected it December 20, 1866, and the legislature of the same state ratified it July 9, 1868; * * *."

It is submitted that the force of the fourteenth amendment as a precedent cannot be waived aside upon any theory that the prior rejections of Georgia and the Carolinas were of no significance in that these rejections were by legislatures having no authority to act at all.

In view of the doubtful constitutionality of the reconstruction acts, *Ex parte Milligan*, 4 Wall. 2, probably what we actually have with respect to the action of Georgia and the Carolinas in the matter of ratification of the fourteenth amendment is that of rejection by a validly constituted legislature and ratification by an invalidly constituted legislature. See Chs. 29 and 30, 2 Warren, The Supreme Court in United States History. If a proposed amendment may be rejected by a legally constituted authority and subsequently ratified by an illegally constituted authority, no reason at all is perceived why an amendment may not be rejected by a legally constituted authority and subsequently ratified by a legally constituted authority.

2. The significance of this precedent

With respect to the fourteenth amendment, we have affirmative action by Congress and the practical construction placed upon the Constitution by Congress.

"The practical construction of the constitution by Congress * * * is entitled to great consideration, es-

pecially in the absence of anything averse to it in the discussion of the convention which framed, and of the conventions which ratified, the constitution."

Veazie State Bank v. Fenno, 8 Wall. 533, 544 (1869).

See, also,

Smiley v. Holm, 285 U. S. 355, 76 L. ed. 795, 52 Sup. Ct. 397 (1931);

United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 5 Sup. Ct. 220 (1930);

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. 495 (1891).

C. *This position is sustained by analogous language used in Art. VII of the constitution when viewed in the light of the problem with which the framers of the constitution were faced and the fears expressed throughout the convention with respect to the difficulty of procuring ratification of the constitution by all or a part of the original thirteen states.*

Art. VII provides:

"The ratification of the conventions of nine States, shall be sufficient for the establishment of this constitution between the States so ratifying the same."

The identicalness of this language with that of Art. V will be noted. Both articles refer only to "ratification." Both are silent with respect to rejection. If there was one thing uppermost in the minds of the framers of the Constitution, it was that of the work of the convention going for naught because of the difficulty expected in all states with respect to ratification by the states. The convention met at a time when an extreme concept of state rights was the order of the day. No one will deny that when our

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revolutionary forefathers believed in states' rights, they believed in states' rights. The debates of the convention are replete with respect to the fears expressed that the Constitution might never be adopted in the several states, or sufficient of them to form a union. Much of the combined thought of the convention was directed to the problem of what effect this or that clause or phraseology might have upon ratification by the several states. The problem was not to devise a machinery which would make it difficult to ratify. The problem was rather to devise an instrument and machinery which would facilitate ratification and make it easy to ratify. The fear expressed by Madison and others at the convention relative to submitting the proposed Constitution to the legislatures of the several states in that such bodies would be jealous of their prerogatives and reluctant to part with any of the state sovereignty, resulted in the submission of the Constitution to state constitutional conventions for ratification rather than to the legislatures of the several states. See House Document 398, 69th Congress, First Session, documents illustrative of formation of the union of the American states, at pages 156, 157, 434, 439, 647, 651, 653, 720, 754, 755, 766, 911 and 945.

The fear was several times expressed that all states might not ratify in the first instance and that the door should be left open for those that refused to ratify coming into the union by later action, id., pages 157 and 755.

At page 434 of the same document, we find Mr. Randolph speaking thusly:

"One idea has pervaded all our proceedings, to wit, that opposition as well from the States as from individuals, will be made to the System to be proposed. Will it not then be highly imprudent, to furnish any unnecessary pretext by the mode of ratifying it. ****"

It is inconceivable that the framers of the Constitution framed it with any idea that a state constitutional convention having once met and rejected the Constitution would be precluded from ratifying either by the same or another constitutional convention. The framers did not say that the Constitution would become the law of the land when ratified by nine of the states *unless previously rejected by four of the states.* The Constitution provides that it shall become effective upon "the ratification of the conventions of nine states,"—and that is all it provides.

Having in mind the tenor, temper and spirit of the times and the extreme states' rights feeling and sentiment that prevailed at the time of the framing of the Constitution; the oft-expressed fear at the convention that it would fail of ratification and the indisputable effort made by the framers of the Constitution to adopt every expediency which would render ratification possible, is it not significant that the framers of this instrument used identical language with respect to adoption of the Constitution in the first instance by ratification thereof by the several states and amendment of this document by ratification? Is it not significant in both instances that the language of the Constitution refers solely to "ratification" and to nothing else? It seems to us that it is of the utmost significance.

D. *This position is sustained by most authorities that have given consideration to the subject*

We have heretofore quoted from Jameson. Jameson, Constitutional Conventions, sec. 579. See also, Willoughby, The Constitutional Law of the U. S., sec. 329-a, v. 1, p. 593; Burdick, The Law of the American Constitution, sec. 20, p. 43; Orfield, Procedure of Federal Amending Power, 25 Ill. Law Rev. 418, 439; Dodd, Amending the Federal Con-

stitution, 30 Yale Law J. 321, 347; Grinnel, Finality of State's Ratification of a Constitutional Amendment, 11 Am. Bar Assn. j. 192; Miller, Amendment of the Federal Constitution, 60 Am. Law Rev. 181-184; Ames, Proposed Amendments to Constitution, p. 229; 12 Corpus Juris 682; Watson on the Constitution, 7 Tenn. Law Rev. 286, 294; Wheeler, May Ratification be Repealed, 20 Case and Comment 548, 550. Contra: Cadwallader, Amending the Federal Constitution, 60 Am. Law Rev. 389, 393.

E. *Analysis of arguments contra to this position*

1. The supposed analogy between action by a legislature to that of a convention and the assumed hypothesis that a convention having met and taken action, all state power to act has been exhausted

The main argument contra to this position is built around the assumed analogy of legislative action with that of action by a convention and an assumed hypothesis that a convention having met and acted, all state power to act has been exhausted. No authority is cited either with respect to the analogy or to the hypothesis. Granted, for purposes of argument, that there is an analogy between legislative action and action by convention, we challenge the soundness of the argument that a convention having met and acted, all state power is exhausted. There does not seem to be any reason at all why a convention duly called might not reconsider its action within the rules of the convention or why another convention might not be called for the same purpose to consider the same amendment when it has become perfectly apparent that the sentiment of the state has changed. This is exactly what was done with respect to North Carolina's entry into the union.

The first convention, called to consider ratifying the Constitution, neither rejected nor ratified. It met in convention on August 1, 1788, and passed the following resolution:

"Resolved, That a Declaration of Rights, asserting and securing from encroachment the great Principles of civil and religious Liberty, and the unalienable Rights of the People, together with Amendments to the most ambiguous and exceptional Parts of the said Constitution of Government, ought to be laid before Congress, and the Convention of the States that shall or may be called for the Purpose of Amending the said Constitution, for their consideration, previous to the Ratification of the Constitution aforesaid, on the part of the State of North Carolina." (Vol. 2, Documentary History of the Federal Constitution, page 266.)

Then follows a declaration of twenty rights and some twenty-six amendments. The convention then dissolved. Constitutional History of the United States, George Ticknor Curtis, page 693. A second ratifying convention met on the 16th of November, 1789, and on the 21st day of November, 1789, ratified the constitution. Vol. 2, Documentary History of the Federal Constitution, page 290; Vol. 2, Thorpe, Constitutional History of the United States, page 181.

It is not perceived how it can be successfully contended that the result would have been any different if the first constitutional convention had refused ratification by affirmatively passing a resolution of rejection. They refused to ratify, and in legal significance, that action must be rejection until further action taken. Affirmative action of rejection is of no greater significance. It merely constitutes rejection until further action taken. Neither positive action of rejection nor negative action of refusal

to ratify constitute "ratification." Both actions merely constitute a withholding of "ratification,"—that is all that they constitute. They do not constitute an exhaustion of power to act or an exhaustion of the power to ratify,—the one power or action that ultimately makes a proposed amendment part of the Constitution of the United States in accordance with the language of that Constitution.

No reason is perceived why either legislatures or constitutional conventions in exercise of the federal function of ratifying or withholding ratification of a proposed amendment should have any less power until exhaustion of the power—in the language of the constitution—by ratifying, than a legislature or other deliberative body possesses, and it is axiomatic that the action of one legislature is not binding upon a succeeding legislature.

Fletcher v. Peck, 6 Cranch. 87.

It is not contended that amendment of the Constitution is a legislative function, but it is contended that there is no reason in law or logic for restraining, restricting or hedging the exercise of that function beyond that of exercise of the legislative function until the point where the amending function has been exhausted, and exhaustion of that function by the language of the constitution itself does not come until "ratification" or withholding of ratification beyond a reasonable length of time. *Dillon v. Gloss*, 41 Sup. Ct. 510, 256 U. S. 368 (1921).

2. The argument that if rejections are of no significance, the states are wholly without power to reject

As stated by Jameson in the quotation on page 4 of this brief, this argument is specious. There can be

no merit to it in view of the holding of this court in *Dillon v. Gloss, supra*, to the effect that failure to ratify by three-fourths of the states within a reasonable length of time constitutes an effective rejection of the amendment. Such a rejection is a rejection by construction of the constitution. We do not question the soundness of such construction. The justification for such construction is that otherwise a proposed amendment might become effective which has lost its vitality through lapse of time and which might have no relation to the felt needs at the time of adoption. No such problem is involved with respect to power to ratify an amendment within a reasonable length of time after having once rejected an amendment. There appears to be no further need for restricting by construction the ratifying powers of the several states with respect to proposed amendments. The constitution provides no restrictions and restrictions by construction, we submit, must be limited to restrictions of necessity, such as the restriction suggested in *Dillon v. Gloss, supra*.

Point II. A One-Time Rejection of the Amendment by Thirteen States (One more than One-fourth) Does Not Defeat the Proposed Amendment or Render Subsequent Ratification Nugatory

- A. *The contention contrary to the above is in essence the argument that a state having once rejected cannot subsequently ratify*

The contention that rejection by more than one-fourth of the states defeats or kills a proposed amendment must fall along with the argument that a prior rejection bars ratification. It is apparent that the former is based upon

the latter. Obviously if no legislature can reject in the sense that its action may be termed final, then rejection by more than one-fourth can be of no effect because any or all of such states may subsequently reverse their action and ratify. By the express language of Art. V of the Constitution, when three-fourths of the states have ratified, the amendment becomes a part of the Constitution. Thus, even though one-half or more of the legislatures should affirmatively reject the amendment, these same legislatures still have constitutional power, by the language of the Constitution itself, to "ratify," still have power to exercise the federal function of ratifying within a reasonable length of time or withholding ratification for an unreasonable length of time.

It is apparent that all of the arguments made with respect to Point I applied with equal force to Point II. If our Point I is well taken, our Point II is well taken. If our arguments with respect to Point I are sound, they are equally sound as applied to Point II. Both points revolve around the question of what is the federal function under Art V of the Constitution. We submit that that function is ratification within a reasonable length of time or withholding of ratification for an unreasonable length of time. Both speak with finality. No other action does speak with finality.

B. This position is supported by the practical construction placed upon the constitution by the legislatures of some twenty-four states

By the end of 1925 more than thirteen states had affirmatively rejected this proposed amendment. That the legislatures of the several states have not considered this amendment dead is evidenced by the action of some

twenty-four state legislatures that have ratified the amendment since 1925, and further evidenced by the action of the legislatures of Arkansas and California (the first two states to ratify the amendment) memorializing the president to continue to use his good office in the direction of the ratification by the remaining states. See Ark. 1937, New Laws, page 321, and resolution of California filed with the Secretary of State January 23, 1937. This practical interpretation of the Constitution by the legislatures of the several states is entitled to weight.

United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 51 Sup. Ct. 220 (1930).

In this latter case, the court says:

"The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. *Martin v. Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903; *Tennessee v. Whithworth*, 117 U. S. 139; 29 L. ed. 833; 6 S. Ct. 649; *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 S. Ct. 651; *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 17 S. Ct. 6; *Edwards v. Cuba R. Co.*, 268 U. S. 628, 69 L. ed. 1124, 45 S. Ct. 614; *Pocket Veto Case (Okanogan Indiana v. United States)* 279 U. S. 655, 73 L. ed. 894, 64 A.L.R. 1434, 49 S. Ct. 463; *Story, Const.* 5th ed. sec. 451; *Cooley, Const. Lim.* 2d. ed. pp. 61, 70." (p. 644)

This is the exact position that we have taken with respect to both Points I and II.

C. *The rationale of Dillon v. Gloss, 256 U. S. 368 is consistent with our position upon Points I and II and inconsistent and in conflict with the contrary position.*

The entire rationale of the above cited case is grounded upon the proposition that unless a proposed amendment is ratified by three-fourths of the states within a reasonable length of time, there is *no way* by which an amendment once proposed can *ever* be defeated, thus resulting in a situation whereby a proposed amendment might be suspended in mid-air *ad infinitum* or perhaps subsequently ratified by sufficient states so as to make the amendment a part of the Constitution and at a time when the amendment would have no relation to the felt needs of the times. It is obvious that the entire rationale of the case disappears if a state once having rejected an amendment is precluded from further action thereon. If the rationale of *Dillon v. Gloss, supra*, is correct (and no one has challenged but that it is), then it must follow that the position we have taken with respect to Points I and II is the only tenable position. The contrary position is absolutely at variance with, contrary to, and in conflict with, the rationale of that case.

Point III. The Amendment Has Not Lost Its Vitality By Lapse of Time

A. *Congressional intent*

The Congress recognized that this amendment was one with respect to which time and education might well be deciding factors as to whether the proposed amendment would ever become a part of the Constitution of the United

States. Although it had seemingly become the accepted practice to place a time limit upon proposed constitutional amendments to be submitted to the several states, Congress refused to place any time limit upon this particular amendment. Four separate amendments to the proposed draft, setting specific time limitations of from five to seven years, were rejected by Congress. *Congressional Record*, 68th Congress, First Session, April 26, 1924, pp. 7288-294; June 2, 1924, p. 10141.

*The Congress thus intended that the states should have the longest possible period consistent with the rule of *Dillon v. Gloss, supra*, in which to ratify this amendment—the longest possible period consistent with ratification by the thirty-six states having relation to the sentiment and felt needs of the time of submission.

B. *Examination of the nature of the problem dealt with by the proposed child labor amendment*

The child labor problem is a product of an extremely complex mechanized industrial civilization. Mechanized industry gave rise to the problem; gave rise to the need for congressional power to cope therewith,—that need must necessarily become greater as industrialization increases. The proposed amendment deals with a subject matter which, when applied to the economics of the country, cannot lose its vitality by lapse of time. Vitality increases rather than diminishes. As industrialization gave rise to the problem, it must follow that increased industrialization by lapse of time vitalizes the problem,—vitalizes the proposed amendment. The problems with which the proposed amendment gives Congress the power to cope increase in intensity as the years go by rather

than decrease in intensity. The history of the amendment and the number of ratifications by the several states in recent years proves this assertion.

C. *History of the amendment.*

Since the turn of the century, efforts have been made in Congress to secure a federal law to prevent the industrial exploitation of children. In December, 1906, the first proposals in Congress for such a law were made when Senator Beveridge of Indiana and Congressman Parsons introduced bills to "prevent the employment of children in factories and mines" and Senator Lodge sponsored a measure designed to "prohibit the employment of children in the manufacture of the production of articles intended for interstate commerce." For ten years, child labor bills were offered before every Congress. Report of the Committee on the Judiciary, House of Representatives, Report No. 395, to accompany H. J. Res. 184, 68th Congress, First Session. Child Labor Amendment to the Constitution of the United States, page 1, March 28, 1924.

It was not until September 1; 1916, that the so-called Keating-Owen bill was passed. This measure sought to close the channels of interstate and foreign commerce to the products of child labor. This act was declared unconstitutional by a divided court in *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

On February 24, 1919, Congress enacted as a part of the revenue act a provision for the levying of a tax of 10% of the annual net profits of any mill, cannery, workshop, factory, or manufacturing establishment, or any mine or quarry, employing children in violation of the

age and hours standards established by the previous law. 40 Stat. 1138, Ch. 18; Revenue Act of 1938, Title III. This act was declared unconstitutional by this court in *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1932).

In the meantime and in 1924, Congress had submitted the proposed amendment now under consideration to the states for ratification. The final form of the amendment was the result of months of deliberation by members of Congress, there having been some forty proposed amendments introduced in Congress by senators and representatives from fourteen states. Congressional Record, 74th Congress, First Session, Vol. 79, Part 2, page 374. Report of the Committee on Judiciary, House of Representatives Report No. 395, to accompany H. J. Res. 184, 68th Congress, First Session. Child Labor Amendment to the Constitution of the United States, pages 17, 21, March 28, 1924. See, also, footnotes 1 and 2 on page 5.

Child labor provisions were contained in the codes that were established under NRA and the federal "Fair Labor Standards Act of 1938," Chapter 676, 3rd Session (public No. 718, 75th Congress) (S. 2475), contains child labor provisions. Congress is thus at the present time endeavoring to deal with the problem of exploitation of child labor by industry within its limited scope of permissible activity under the Constitution.

- D. Because of economic similarity today with that of 1924 when the child labor amendment was submitted with respect to the problem dealt with by that amendment; the amendment has not lost its vitality by lapse of time under any reasonable interpretation of *Dillon v. Gloss*, 256 U. S. 368.

Unless it can be said that the ratifications by the states of Kansas and Kentucky in 1937 have no reasonable relation to the sentiment and felt needs of 1924, this proposed amendment has not lost its vitality; the decision of the Kansas court should be affirmed and the decision of the Kentucky court reversed. When the legislatures of the two states that first ratified the amendment, Arkansas in 1924 and California in 1925, memorialized the president in 1937 to "continue to use his good office to persuade the remaining states to follow in the footsteps of the twenty-four states that have ratified this worthy amendment," how can it reasonably be said that the ratification of Kansas in 1937 has no relation to the sentiment and felt needs of 1924?

When lapse of time vitalizes rather than devitalizes the intensity of the problem with which the amendment seeks to give Congress the power to cope, how can it reasonably be argued that the amendment has lost its vitality by lapse of time? Every known factor in our economic civilization disproves any such assertion.

We have been favored with factual data regarding the child labor amendment, prepared by the Children's Bureau of the United States Department of Agriculture, from which factual data it appears that not a single year has passed since 1924 without some action with respect to the amendment in a state legislature. In some years the majority of legislatures in session have had the question before them.

Twenty national organizations sponsored the amendment and appeared at the Congressional hearings urging its passage by Congress and submission to the states, and many of these organizations have endorsed and actively worked for the ratification of the amendment throughout the intervening years. Many educational organizations have been formed since the amendment was submitted to work for ratification of the amendment. It is common knowledge that organizations have likewise been formed to oppose ratification of the amendment and that these latter organizations have been equally active with those working toward ratification of the amendment.

Throughout the entire period, the public has been favored with every conceivable argument pro and con—for and against. It is common knowledge that the amendment has been the subject of many news items and of editorial comment literally since the date of its first submission to the states for ratification. The amendment has been the subject of political support and opposition by contending factions in the several states.

An amendment, that has been as live and burning an issue as this has been since its submission, can hardly be said to have lost its vitality by reason of age. No one can have the temerity to assert that the problem with which this amendment seeks to cope has fallen into an innocuous desuetude by reason of lack of interest and change by time. It cannot be denied that the issue is just as alive today and was just as alive in 1937 when Kansas and Kentucky ratified, as it was when it was submitted to the several states for ratification in 1924. Under such circumstances the amendment still retains its vitality under the rule of *Dillon v. Gloss, supra.* There can be no serious question of Kansas and Kentucky having ratified this amendment at a

time when the sentiment and felt needs of the time bear no relation to the sentiment and felt needs of the time of submission. The sentiment and felt needs of 1937 are no different than the sentiment and felt needs of 1924, except that in the interim and through the process of education, the states have become more than ever conscious of the need for this amendment. It is conceivable that the spectacle of unemployed fathers supported by an employed minor child or children may have been as effective an object lesson to the several states with respect to the felt need for the amendment as many tomes of statistics relative to the child labor problem.

The proposed amendment has not fallen into decay through lapse of time but, on the contrary, is as vital and burning and live a question today as it was in 1924. Such being true, the ratifications by the states of Kansas and Kentucky meet the test imposed by any reasonable interpretation of *Dillon v. Gloss, supra*. It is submitted that the decision of the supreme court of Kansas upholding the validity of the Kansas ratification should be affirmed and that the decision of the court of appeals of Kentucky holding invalid the ratification by that state should be reversed.

Respectfully submitted,

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*Assistant Attorneys General
as Amicus Curiae for and on
behalf of the State of Wisconsin.*

PP. 4, 6, 20

SUPREME COURT OF THE UNITED STATES.

No. 7.—OCTOBER TERM, 1938.

Rolla W. Coleman, W. A. Barron,
Claude C. Bradney, et al., Peti-
tioners,

vs.

Clarence W. Miller, as Secretary of
the Senate of the State of Kansas,
et al.

On Writ of Certiorari to
the Supreme Court of
the State of Kansas.

[June 5, 1939.]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

In June, 1924, the Congress proposed an amendment to the Constitution, known as the Child Labor Amendment.¹ In January, 1925, the Legislature of Kansas adopted a resolution rejecting the proposed amendment and a certified copy of the resolution was sent to the Secretary of State of the United States. In January, 1937, a resolution known as "Senate Concurrent Resolution No. 3" was introduced in the Senate of Kansas ratifying the proposed amendment. There were forty senators. When the resolution came up for consideration, twenty senators voted in favor of its adoption and twenty voted against it. The Lieutenant Governor, the presiding officer of the Senate, then cast his vote in favor of the resolution. The resolution was later adopted by the House of Representatives on the vote of a majority of its members.

This original proceeding in mandamus was then brought in the Supreme Court of Kansas by twenty-one members of the Senate, including the twenty senators who had voted against the resolution, and three members of the house of representatives, to compel the Secretary of the Senate to erase an endorsement on the resolution

¹The text of the proposed amendment is as follows (43 Stat. 670):

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Sec. 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

to the effect that it had been adopted by the Senate and to endorse thereon the words "was not passed", and to restrain the officers of the Senate and House of Representatives from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor. The petition challenged the right of the Lieutenant Governor to cast the deciding vote in the Senate. The petition also set forth the prior rejection of the proposed amendment and alleged that in the period from June, 1924, to March, 1927, the amendment had been rejected by both houses of the legislatures of twenty-six states, and had been ratified in only five states, and that by reason of that rejection and the failure of ratification within a reasonable time the proposed amendment had lost its vitality.

An alternative writ was issued. Later the Senate passed a resolution directing the Attorney General to enter the appearance of the State and to represent the State as its interests might appear. Answers were filed on behalf of the defendants other than the State and plaintiffs made their reply.

The Supreme Court found no dispute as to the facts. The court entertained the action and held that the Lieutenant Governor was authorized to cast the deciding vote, that the proposed amendment retained its original vitality, and that the resolution "having duly passed the house of representatives and the senate, the act of ratification of the proposed amendment by the legislature of Kansas was final and complete". The writ of mandamus was accordingly denied. 146 Kan. 390. This Court granted certiorari. 303 U. S. 632.

First.—The jurisdiction of this Court.—Our authority to issue the writ of certiorari is challenged upon the ground that petitioners have no standing to seek to have the judgment of the state court reviewed, and hence it is urged that the writ of certiorari should be dismissed. We are unable to accept that view.

The state court held that it had jurisdiction; that "the right of the parties to maintain the action is beyond question".² The state

² The state court said on this point:

"At the threshold we are confronted with the question raised by the defendants as to the right of the plaintiffs to maintain this action. It appears that on March 30, 1937, the state senate adopted a resolution directing the attorney general to appear for the state of Kansas in this action. It further appears that on April 3, 1937, on application of the attorney general, an order was entered making the state of Kansas a party defendant. The state being a party to the proceedings, we think the right of the parties to maintain the action is beyond question. (G. S. 1935, 75-702; *State, ex rel. v Public Service Comm.*, 135 Kan. 491, 11 P. 2d 999.)"

court thus determined in substance that members of the legislature had standing to seek, and the court had jurisdiction to grant, mandamus to compel a proper record of legislative action. Had the questions been solely state questions, the matter would have ended there. But the questions raised in the instant case arose under the Federal Constitution and these questions were entertained and decided by the state court. They arose under Article V of the Constitution which alone conferred the power to amend and determined the manner in which that power could be exercised. *Hawke v. Smith* (No. 1), 253 U. S. 221, 227; *Leser v. Garnett*, 258 U. S. 130, 137. Whether any or all of the questions thus raised and decided are deemed to be justiciable or political, they are exclusively federal questions and not state questions.

We find the cases cited in support of the contention, that petitioners lack an adequate interest to invoke our jurisdiction to review, to be inapplicable.³ Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions, their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege. As the validity of a state statute was not assailed, the remedy by appeal was not available (Jud. Code, Sec. 237(a); 28 U. S. C. 341(a)) and the appropriate remedy was by writ of certiorari which we granted. Jud. Code, Sec. 237(b); 28 U. S. C. 344(b).

The contention to the contrary is answered by our decisions in *Hawke v. Smith*, *supra* and *Leser v. Garnett*, *supra*. In *Hawke v. Smith*, the plaintiff in error, suing as a "citizen and elector of the State of Ohio, and as a taxpayer and elector of the County of Hamilton", on behalf of himself and others similarly situated, filed a petition for an injunction in the state court to restrain the Secretary of State from spending the public money in preparing and

³ See *Caffrey v. Oklahoma Territory*, 177 U. S. 346; *Smith v. Indiana*, 191 U. S. 138; *Braxton County Court v. West Virginia*, 208 U. S. 192; *Marshall v. Dye*, 231 U. S. 250; *Stewart v. Kansas City*, 239 U. S. 14; *Columbus & Greenville Railway Co. v. Miller*, 283 U. S. 96.

printing ballots for submission of a referendum to the electors on the question of the ratification of the Eighteenth Amendment to the Federal Constitution. A demurrer to the petition was sustained in the lower court and its judgment was affirmed by the intermediate appellate court and the Supreme Court of the State. This Court entertained jurisdiction and, holding that the state court had erred in deciding that the State had authority to require the submission of the ratification to a referendum, reversed the judgment.

In *Leser v. Garnett*, qualified voters in the State of Maryland brought suit in the state court to have the names of certain women stricken from the list of qualified voters on the ground that the constitution of Maryland limited suffrage to men and that the Nineteenth Amendment to the Federal Constitution has not been validly ratified. The state court took jurisdiction and the Court of Appeals of the State affirmed the judgment dismissing the petition. We granted certiorari. On the question of our jurisdiction we said:

of the action of

"The petitioners contended, on several grounds, that the Amendment had not become part of the Federal Constitution. The trial court overruled the contentions and dismissed the petition. Its judgment was affirmed by the Court of Appeals of the State, 139 Md. 46; and the case comes here on writ of error. That writ must be dismissed; but the petition for a writ of certiorari, also duly filed, is granted. The laws of Maryland authorized such a suit by a qualified voter against the Board of Registry. Whether the Nineteenth Amendment has become part of the Federal Constitution is the question presented for decision".

And holding that the official notice to the Secretary of State, duly authenticated, ~~that~~ the legislatures of the States, whose alleged ratifications were assailed, was conclusive upon the Secretary of State and that his proclamation accordingly of ratification was conclusive upon the courts, we affirmed the judgment of the state court.

That the question of our jurisdiction in *Leser v. Garnett* was decided upon deliberate consideration is sufficiently shown by the fact that there was a motion to dismiss the writ of error for the want of jurisdiction and opposition to the grant of certiorari. The decision is the more striking because on the same day, in an opinion immediately preceding which was prepared for the Court by the same Justice,⁴ jurisdiction had been denied to a federal court (the

⁴ Mr. Justice Brandeis.

Supreme Court of the District of Columbia) of a suit by citizens of the United States, taxpayers and members of a voluntary association organized to support the Constitution, in which it was sought to have the Nineteenth Amendment declared unconstitutional and to enjoin the Secretary of State from proclaiming its ratification and the Attorney General from taking steps to enforce it. *Fairchild v. Hughes*, 258 U. S. 126. The Court held that the plaintiffs' alleged interest in the question submitted was not such as to afford a basis for the proceeding; that the plaintiffs had only the right possessed by every citizen "to require that the Government be administered according to law and that the public moneys be not wasted" and that this general right did not entitle a private citizen to bring such a suit as the one in question in the federal courts.⁵ It would be difficult to imagine a situation in which the adequacy of the petitioners' interest to invoke our appellate jurisdiction in *Leser v. Garnett* could have been more sharply presented.

The effort to distinguish that case on the ground that the plaintiffs were qualified voters in Maryland, and hence could complain of the admission to the registry of those alleged not to be qualified, is futile. The interest of the plaintiffs in *Leser v. Garnett* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case. This is not a mere intra-parliamentary controversy but the question relates to legislative action deriving its force solely from the provisions of the Federal Constitution, and the twenty senators were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being a part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution. ▼

We are of the opinion that *Hawke v. Smith* and *Leser v. Garnett* are controlling authorities, but in view of the wide range the discussion has taken we may refer to some other instances in which the question of what constitutes a sufficient interest to enable one to invoke our appellate jurisdiction has been involved. The principle that the applicant must show a legal interest in the controversy has been maintained. It has been applied repeatedly in cases where municipal corporations have challenged state legislation affecting their alleged rights and obligations. Being but creatures of the State,

⁵ *Id.*, pp. 129, 130. See, also, *Frothingham v. Mellon*, 282 U. S. 447, 480, 486, 487.

municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator.⁶ But there has been recognition of the legitimate interest of public officials and administrative commissions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties. Under the Urgent Deficiencies Act,⁷ the Interstate Commerce Commission, and commissions representing interested States which have intervened, are entitled as "aggrieved parties" to an appeal to this Court from a decree setting aside an order of the Interstate Commerce Commission, though the United States refuses to join in the appeal. *Interstate Commerce Commission v. Oregon-Washington R. & N. Co.*, 288 U. S. 14. So, this Court may grant certiorari, on the application of the Federal Trade Commission, to review decisions setting aside its orders.⁸ *Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568. Analogous provisions authorize certiorari to review decisions against the National Labor Relations Board.⁹ *National Labor Relations Board v. Jones & Laughlin Corporation*, 301 U. S. 1. Under Section 266 of the Judicial Code (28 U. S. C. 380), where an injunction is sought to restrain the enforcement of a statute of a State or an order of its administrative board or commission, upon the ground of invalidity under the Federal Constitution, the right of direct appeal to this Court from the decree of the required three judges is accorded whether the injunction be granted or denied. Hence, in case the injunction is granted, the state board is entitled to appeal. See, for example, *South Carolina Highway Department v. Barnwell Brothers*, 303 U. S. 177.

The question of our authority to grant certiorari, on the application of state officers, to review decisions of state courts declaring state statutes, which these officers seek to enforce, to be repugnant to the Federal Constitution, has been carefully considered and our jurisdiction in that class of cases has been sustained. The original Judiciary Act of 1789 provided in Section 25¹⁰ for the review by

⁶ *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394; *Trenton v. New Jersey*, 262 U. S. 182; *Risty v. Chicago, R. I. & Pac. Rwy. Co.*, 270 U. S. 378; *Williams v. Mayor*, 289 U. S. 36.

⁷ Act of October 22, 1913, 38 Stat. 219; 28 U. S. C. 47, 47a, 345.

⁸ 15 U. S. C. 45, ~~50~~; 28 U. S. C. 348.

⁹ 29 U. S. C. 160(e). See, also, as to orders of Federal Communications Commission, 47 U. S. C. 402(e).

¹⁰ 1 Stat. 73, 85, 86.

this Court of a judgment of a state court "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity"; that is, where the claim of federal right had been denied. By the Act of December 23, 1914,¹¹ it was provided that this Court may review on certiorari decisions of state courts *sustaining* a federal right. The present statute governing our jurisdiction on certiorari contains the corresponding provision that this Court may exercise that jurisdiction "as well where the federal claim is sustained as where it is denied". Jud. Code, Section 237(b); 38 U. S. C. 344(b). The plain purpose was to provide an opportunity, deemed to be important and appropriate, for the review of the decisions of state courts on constitutional questions, however the state court might decide them. Accordingly where the claim of a complainant that a state officer be restrained from enforcing a state statute because of constitutional invalidity is sustained by the state court, the statute enables the state officer to seek a reversal by this Court of that decision.

In *Blodgett v. Silberman*, 277 U. S. 1, 7, the Court granted certiorari on the application of the State Tax Commissioner of Connecticut who sought review of the decision of the Supreme Court of Errors of the State so far as it denied the right created by its statute to tax the transfer of certain securities, which had been placed for safekeeping in New York, on the ground that they were not within the taxing jurisdiction of Connecticut. Entertaining jurisdiction, this Court reversed the judgment in that respect. *Id.*, p. 18.

The question received most careful consideration in the case of *Boynton, Attorney General, v. Hutchinson Gas Company*, 291 U. S. 656, where the Supreme Court of Kansas had held a state statute to be repugnant to the Federal Constitution, and the Attorney General of the State applied for certiorari. His application was opposed upon the ground that he had merely an official interest in the controversy and the decisions were invoked upon which the Government relies in challenging our jurisdiction in the instant case.¹² Because of its importance, and contrary to our usual practice, the Court directed oral argument on the question whether certiorari

¹¹ 38 Stat. 790; see, also, Act of September 6, 1916, 39 Stat. 726.

¹² See cases cited in Note 3.

should be granted and after that argument, upon mature deliberation, granted the writ. The writ was subsequently dismissed but only because of a failure of the record to show service of summons and severance upon the appellees in the state court who were not parties to the proceedings here. 292 U. S. 601. This decision with respect to the scope of our jurisdiction has been followed in later cases. In *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, we granted certiorari on an application by the warden of a city prison to review the decision of the Court of Appeals of the State on *habeas corpus*, ruling that the minimum wage law of the State violated the Federal Constitution. This Court decided the case on the merits. In *Kelly v. Washington ex rel. Foss Company*, 302 U. S. 1, we granted certiorari, on the application of the state authorities charged with the enforcement of the state law relating to the inspection and regulation of vessels, to review the decision of the state court holding the statute invalid in its application to navigable waters. We concluded that the state act had a permissible field of operation and the decision of the state court in holding the statute completely unenforceable in deference to federal law was reversed.

This class of cases in which we have exercised our appellate jurisdiction on the application of state officers may be said to recognize that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question. In none of these cases could it be said that the state officers invoking our jurisdiction were sustaining any "private damage".

While one who asserts the mere right of a citizen and taxpayer of the United States to complain of the alleged invalid outlay of public moneys has no standing to invoke the jurisdiction of the federal courts (*Frothingham v. Mellon*, 262 U. S. 447, 480, 486, 487), the Court has sustained the more immediate and substantial right of a resident taxpayer to invoke the interposition of a court of equity to enjoin an illegal use of moneys by a municipal corporation. *Crampton v. Zabriskie*, 101 U. S. 601, 609; *Frothingham v. Mellon*, *supra*. In *Heim v. McCall*, 239 U. S. 175, we took jurisdiction on a writ of error sued out by a property owner and taxpayer, who had been given standing in the state court, for the purpose of reviewing its decision sustaining the validity under the Federal Constitution of a state statute as applied to contracts for the construction of public works in the City of New York, the enforcement of which was alleged to involve irreparable loss to the city and hence to be inimical to the interests of the taxpayer.

In *Smiley v. Holm*, 285 U. S. 355, we granted certiora on the application of one who was an "elector", as well as a "tizen" and "taxpayer", and who assailed under the Federal Constitution a state statute establishing congressional districts. Passing upon the merits we held that the function of a state legislature in prescribing the time, place and manner of holding elections for representatives in Congress under Article I, Section 4, was a law-making function in which the veto power of the state governor participates, if under the state constitution the governor has that power in the course of the making of state laws, and accordingly reversed the judgment of the state court. We took jurisdiction on certiorari in a similar case from New York where the petitioners were "citizens and voters of the State" who had sought a mandamus to compel the Secretary of State of New York to certify that representatives in Congress were to be elected in the congressional districts as defined by a concurrent resolution of the Senate and Assembly of the legislature. There the state court, construing the provision of the Federal Constitution as contemplating the exercise of the law-making power, had sustained the defense that the concurrent resolution was ineffective as it had not been submitted to the Governor for approval, and refused the writ of mandamus. We affirmed the judgment. *Koenig v. Flynn*, 285 U. S. 385.

In the light of this course of decisions, we find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision.

Second.—The participation of the Lieutenant Governor.—Petitioners contend that, in the light of the powers and duties of the Lieutenant Governor and his relation to the Senate under the state constitution, as construed by the supreme court of the state, the Lieutenant Governor was not a part of the "legislature" so that under Article V of the Federal Constitution, he could be permitted to have a deciding vote on the ratification of the proposed amendment, when the senate was equally divided.

Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point.

Third.—The effect of the previous rejection of the amendment and of the lapse of time since its submission.

1. The state court adopted the view expressed by text-writers that a state legislature which has rejected an amendment proposed by the Congress may later ratify.¹³ The argument in support of that view is that Article V says nothing of rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the States; that the power to ratify is thus conferred upon the State by the Constitution and, as a ratifying power, persists despite a previous rejection. The opposing view proceeds on an assumption that if ratification by "Conventions" were prescribed by the Congress, a convention could not reject and, having adjourned *sine die*, be reassembled and ratify. It is also premised, in accordance with views expressed by text-writers,¹⁴ that ratification if once given cannot afterwards be rescinded and the amendment rejected, and it is urged that the same effect in the exhaustion of the State's power to act should be ascribed to rejection; that a State can act "but once, either by convention or through its legislature".

Historic instances are cited. In 1865, the Thirteenth Amendment was rejected by the legislature of New Jersey which subsequently ratified it, but the question did not become important as ratification by the requisite number of States had already been proclaimed.¹⁵ The question did arise in connection with the adoption of the Fourteenth Amendment. The legislatures of Georgia, North Carolina and South Carolina had rejected the amendment in November and December, 1866.¹⁶ New governments were erected in those States (and in others) under the direction of Congress.¹⁷ The new legislatures ratified the amendment, that of North Carolina on July 4, 1868, that of South Carolina on July 9, 1868, and that of Georgia on July 21, 1868.¹⁸ Ohio and New Jersey first ratified and then

¹³ Jameson on Constitutional Conventions, Secs. 576-581; Willoughby on the Constitution, Sec. 329a.

¹⁴ Jameson, *op. cit.*, Secs. 582-584; Willoughby, *op. cit.*, Sec. 329a; Ames: "Proposed Amendments to the Constitution", House Doc. No. 353, Pt. 2, 54th Cong., 2d sess., pp. 299, 300.

¹⁵ 13 Stat. 774, 775; Jameson, *op. cit.*, Sec. 576; Ames, *op. cit.*, p. 300.

¹⁶ 15 Stat. 710.

¹⁷ Act of March 2, 1867, 14 Stat., p. 428. See White & Hart, 13 Wall. 646, 652.

¹⁸ 15 Stat. 710.

passed resolutions withdrawing their consent.¹⁹ As there were then thirty-seven States, twenty-eight were needed to constitute the requisite three-fourths. On July 9, 1868, the Congress adopted a resolution requesting the Secretary of State to communicate "a list of the States of the Union whose legislatures have ratified the fourteenth article of amendment",²⁰ and in Secretary Seward's report attention was called to the action of Ohio and New Jersey.²¹ On July 20th Secretary Seward issued a proclamation reciting the ratification by twenty-eight States, including North Carolina, South Carolina, Ohio and New Jersey, and stating that it appeared that Ohio and New Jersey had since passed resolutions withdrawing their consent and that "it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual". The Secretary certified that if the ratifying resolutions of Ohio and New Jersey were still in full force and effect, notwithstanding the attempted withdrawal, the amendment had become a part of the Constitution.²² On the following day the Congress adopted a concurrent resolution which, reciting that three-fourths of the States having ratified (the list including North Carolina, South Carolina, Ohio and New Jersey),²³ declared the Fourteenth Amendment to be a part of the Constitution and that it should be duly promulgated as such by the Secretary of State. Accordingly, Secretary Seward, on July 28th, issued his proclamation embracing the States mentioned in the congressional resolution and adding Georgia.²⁴

Thus the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification.²⁵ While there were special circumstances, because of the action of the Congress in relation to the governments of the rejecting States (North Carolina, South Carolina and Georgia), these circumstances were not recited in proclaiming ratification and

¹⁹ 15 Stat. 707.

²⁰ Cong. Globe, 40th Cong., 2d sess., p. 3857.

²¹ Cong. Globe, 40th Cong., 2d sess., p. 4070.

²² 15 Stat. 706, 707.

²³ 15 Stat. 709, 710.

²⁴ 15 Stat. 710, 711; Ames, *op. cit.*, App. No. 1140, p. 377.

²⁵ The legislature of New York which had ratified the Fifteenth Amendment in 1869 attempted, in January, 1870, to withdraw its ratification, and while this fact was stated in the proclamation by Secretary Fish of the ratification of the amendment, and New York was not needed to make up the required three-fourths, that State was included in the list of ratifying States.

¹⁶ Stat. 1131; Ames, *op. cit.*, App. No. 1284, p. 388.

the previous action taken in these States was set forth in the proclamation as actual previous rejections by the respective legislatures. This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

The precise question as now raised is whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action. Article V, speaking solely of ratification, contains no provision as to rejection.²⁶ Nor has the Congress enacted a statute relating to rejections. The statutory provision with respect to constitutional amendments is as follows:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States"²⁷

The statute presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. We see no warrant for judicial interference with the performance of that duty. See *Leser v. Garnett, supra*, p. 137

2. The more serious question is whether the proposal by the Congress of the amendment had lost its vitality through lapse of time and hence it could not be ratified by the Kansas legislature in 1937. The argument of petitioners stresses the fact that nearly

²⁶ Compare Article VII.

²⁷ 5 U. S. C. 160. From Act of April 20, 1818, Sec. 2; 3 Stat. 439; R. S. Sec. 205.

thirteen years elapsed between the proposal in 1924 and the ratification in question. It is said that when the amendment was proposed there was a definitely adverse popular sentiment and that at the end of 1925 there had been rejection by both houses of the legislatures of sixteen States and ratification by only four States, and that it was not until about 1933 that an aggressive campaign was started in favor of the amendment. In reply, it is urged that Congress did not fix a limit of time for ratification and that an unreasonably long time had not elapsed since the submission; that the conditions which gave rise to the amendment had not been eliminated; that the prevalence of child labor, the diversity of state laws and the disparity in their administration, with the resulting competitive inequalities, continued to exist. Reference is also made to the fact that a number of the States have treated the amendment as still pending and that in the proceedings of the national government there have been indications of the same view.²⁸ It is said that there were fourteen ratifications in 1933, four in 1935, one in 1936, and three in 1937.

We have held that the Congress in proposing an amendment may fix a reasonable time for ratification. *Dillon v. Gloss*, 258 U. S. 368. There we sustained the action of the Congress in providing in the proposed Eighteenth Amendment that it should be inoperative unless ratified within seven years.²⁹ No limitation of time for ratification is provided in the instant case either in the proposed amendment or in the resolution of submission. But petitioners contend that, in the absence of a limitation by the Congress, the Court can and should decide what is a reasonable period within which ratification may be had. We are unable to agree with that contention.

It is true that in *Dillon v. Gloss* the Court said that nothing was found in Article V which suggested that an amendment once proposed was to be open to ratification for all time, or that ratification in some States might be separated from that in others by many years and yet be effective; that there was a strong suggestion to the contrary in that proposal and ratification were but succeeding steps in a single endeavor; that as amendments were deemed to be prompted by necessity, they should be considered and disposed of

²⁸ Sen. Rep. 726, 75th Cong., 1st sess.; Sen. Rep. 788, 75th Cong., 1st sess.: Letter of the President on January 8, 1937, to the Governors of nineteen nonratifying States whose legislatures were to meet in that year, urging them to press for ratification. *New York Times*, January 9, 1937, p. 5.

²⁹ 40 Stat. 1050. A similar provision was inserted in the Twenty-first Amendment. *United States v. Chambers*, 291 U. S. 217, 222.

presently; and that there is a fair implication that ratification must be sufficiently contemporaneous in the required number of States to reflect the will of the people in all sections at relatively the same period; and hence that ratification must be within some reasonable time after the proposal. These considerations were cogent reasons for the decision in *Dillon v. Gloss* that the Congress had the power to fix a reasonable time for ratification. But it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications. That question was not involved in *Dillon v. Gloss* and, in accordance with familiar principle, what was there said must be read in the light of the point decided.

Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. In their endeavor to answer this question petitioners' counsel have suggested that at least two years should be allowed; that six years would not seem to be unreasonably long; that seven years had been used by the Congress as a reasonable period; that one year, six months and thirteen days was the average time used in passing upon amendments which have been ratified since the first ten amendments; that three years, six months and twenty-five days has been the longest time used in ratifying. To this list of variables, counsel add that "the nature and extent of publicity and the activity of the public and of the legislatures of the several States in relation to any particular proposal should be taken into consideration". That statement is pertinent, but there are additional matters to be examined and weighed. When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which

it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.

Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts.

It would unduly lengthen this opinion to attempt to review our decisions as to the class of questions deemed to be political and not justiciable. In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.³⁰ There are many illustrations in the field of our conduct of foreign relations, where there are "considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a Court of Justice". *Ware v. Hylton*, 3 Dall. 199, 260.³¹ Questions in-

³⁰ See Willoughby, *op. cit.*, pp. 1326, *et seq.*; Oliver P. Field, "The Doctrine of Political Questions in the Federal Courts", 8 Minnesota Law Review, 485; Melville Fuller Weston, "Political Questions", 38 Harvard Law Review, 296.

³¹ See, also, *United States v. Palmer*, 3 Wheat. 610, 634; *Foster v. Neilson*, 2 Pet. 253, 309; *Doe v. Braden*, 16 How. 635, 657; *Terlinden v. Ames*, 184 U. S. 270, 288.

volving similar considerations are found in the government of our internal affairs. Thus, under Article IV, section 4, of the Constitution, providing that the United States "shall guarantee to every State in this Union a Republican Form of Government", we have held that it rests with the Congress to decide what government is the established one in a State and whether or not it is republican in form. *Luther v. Borden*, 7 How. 1, 42. In that case Chief Justice Taney observed that "when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal". So, it was held in the same case that under the provision of the same Article for the protection of each of the States "against domestic violence" it rested with the Congress "to determine upon the means proper to be adopted to fulfil this guarantee". *Id.*, p. 43. So, in *Pacific Telephone Company v. Oregon*, 223 U. S. 118, we considered that questions arising under the guaranty of a republican form of government had long since been "definitely determined to be political and governmental" and hence that the question whether the government of Oregon had ceased to be republican in form because of a constitutional amendment by which the people reserved to themselves power to propose and enact laws independent of the legislative assembly and also to approve or reject any act of that body, was a question for the determination of the Congress. It would be finally settled when the Congress admitted the senators and representatives of the State.

For the reasons we have stated, which we think to be as compelling as those which underlay the cited decisions, we think that the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications. The state officials should not be restrained from certifying to the Secretary of State the adoption by the legislature of Kansas of the resolution of ratification.

As we find no reason for disturbing the decision of the Supreme Court of Kansas in denying the mandamus sought by petitioners, its judgment is affirmed but upon the grounds stated in this opinion.

Affirmed.

Concurring opinion by Mr. Justice BLACK, in which Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and Mr. Justice DOUGLAS join.

Although, for reasons to be stated by Mr. Justice FRANKFURTER, we believe this cause should be dismissed, the ruling of the Court just announced removes from the case the question of petitioners' standing to sue. Under the compulsion of that ruling,¹ Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS and I have participated in the discussion of other questions considered by the Court and we concur in the result reached, but for somewhat different reasons.

The Constitution grants Congress exclusive power to control submission of constitutional amendments. Final determination by Congress that ratification by three-fourths of the States has taken place "is conclusive upon the courts."² In the exercise of that power, Congress, of course, is governed by the Constitution. However, whether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, call for decisions by a "political department" of questions of a type which this Court has frequently designated "political." And decision of a "political question" by the "political department" to which the Constitution has committed it "conclusively binds the judges, as well as all other officers, citizens and subjects of . . . government."³ Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation.⁴ To the extent that the Court's opinion in the

¹ Cf., Helvering v. Davis, 301 U. S. 619, 639-40.

² Leser v. Garnett, 258 U. S. 130, 137.

³ Jones v. United States, 137 U. S. 202, 212; Foster & Elam v. Neilson, 2 Pet. 253, 309, 314; Luther v. Borden, et al., 7 Howard 1, 42; In re Cooper, 143 U. S. 472, 503; Pacific Telephone Co. v. Oregon, 223 U. S. 118; Davis v. Ohio, 241 U. S. 565, 569; "And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive [the political department'] be right or wrong. It is enough to know that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and the government of the Union. . . . this Court have laid down the rule, that the action of the political branches of the government in a matter that belongs to them, is conclusive." Williams v. The Suffolk Ins. Co., 13 Pet. 415, 420.

⁴ Field v. Clark, 143 U. S. 649, 672.

present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree.

The State court below assumed jurisdiction to determine whether the proper procedure is being followed between submission and final adoption. However, it is apparent that judicial review of or pronouncements upon a supposed limitation of a "reasonable time" within which Congress may accept ratification; as to whether duly authorized State officials have proceeded properly in ratifying or voting for ratification; or whether a State may reverse its action once taken upon a proposed amendment; and kindred questions, are all consistent only with an ultimate control over the amending process in the courts. And this must inevitably embarrass the course of amendment by subjecting to judicial interference matters that we believe were intrusted by the Constitution solely to the political branch of government.

The Court here treats the amending process of the Constitution in some respects as subject to judicial construction, in others as subject to the final authority of the Congress. There is no disapproval of the conclusion arrived at in *Dillon v. Gloss*,⁵ that the Constitution impliedly requires that a properly submitted amendment must die unless ratified within a "reasonable time." Nor does the Court now disapprove its prior assumption of power to make such a pronouncement. And it is not made clear that only Congress has constitutional power to determine if there is any such implication in Article V of the Constitution. On the other hand, the Court's opinion declares that Congress has the exclusive power to decide the "political questions" of whether a State whose legislature has once acted upon a proposed amendment may subsequently reverse its position, and whether, in the circumstances of such a case as this, an amendment is dead because an "unreasonable" time has elapsed. No such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitu-

⁵ 256 U. S. 398, 375.

on, and is not subject to judicial guidance, control or interference at any point.

Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress, and insofar as *Dillon v. Gloss* attempts judicially to impose a limitation upon the right of Congress to determine final adoption of an amendment, it should be disapproved. If Congressional determination that an amendment has been completed and become a part of the Constitution is final and removed from examination by the courts, as the Court's present opinion recognizes, surely the steps leading to that condition must be subject to the scrutiny, control and appraisal of none save the Congress, the body having exclusive power to make that final determination.

Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither State nor Federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority.

Opinion of Mr. Justice FRANKFURTER.

It is the view of Mr. Justice ROBERTS, Mr. Justice BLACK, Mr. Justice DOUGLAS and myself that the petitioners have no standing in this Court.

In endowing this Court with "judicial Power" the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. The Constitution further explicitly indicated the limited area within which judicial action was to move—however far-reaching the consequences of action within that area—by extending "judicial Power" only to "Cases" and "Controversies". Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English ju-

dicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies." It was not for courts to meddle with matters that required no subtlety to be identified as political issues.¹ And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law. Compare *Muskrat v. United States*, 219 U. S. 346; *Tutun v. United States*, 270 U. S. 568, *Willing v. Chicago Auditorium Assn.*, 277 U. S. 274; *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249.

As abstractions, these generalities represent common ground among judges. Since, however, considerations governing the exercise of judicial power are not mechanical criteria but derive from conceptions regarding the distribution of governmental powers in their manifold, changing guises, differences in the application of canons of jurisdiction have arisen from the beginning of the Court's history.² Conscious or unconscious leanings toward the serviceability of the judicial process in the adjustment of public controversies clothed in the form of private litigation inevitably affect decisions. For they influence awareness in recognizing the relevance of conceded doctrines of judicial self-limitation and rigor in enforcing them.

Of all this, the present controversy furnishes abundant illustration. Twenty-one members of the Kansas Senate and three members of its House of Representatives brought an original mandamus proceeding in the Supreme Court of that State to compel the Secretary of its Senate to erase an endorsement on Kansas "Senate Concurrent Resolution No. 3" of January 1937, to the effect that it had been passed by the Senate, and instead to endorse thereon the words "not passed." They also sought to restrain the officers of both Senate and House from authenticating and delivering it to the Governor of the State for transmission to the Secretary of State of

¹ For an early instance of the abstention of the King's Justices from matters political, see the Duke of York's Claim to the Crown, House of Lords, 1460, 5 Rot. Parl. 375, reprinted in Wambaugh, Cases on Constitutional Law, 1.

² See e. g. the opinion of Mr. Justice Iredell in *Chisholm v. Georgia*, 2 Dall. 419, 429; concurring opinion of Mr. Justice Johnson in *Fletcher v. Peck*, 6 Cranch 87, 143; and the cases collected in the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341.

the United States. These Kansas legislators resorted to their Supreme Court claiming that there was no longer an amendment open for ratification by Kansas and that, in any event, it had not been ratified by the "legislature" of Kansas, the constitutional organ for such ratification. See Article V of the Constitution of the United States. The Kansas Supreme Court held that the Kansas legislators had a right to its judgment on these claims, but on the merits decided against them and denied a writ of mandamus. Urging that such denial was in derogation of their rights under the Federal Constitution, the legislators, having been granted *certiorari* to review the Kansas judgment, 303 U. S. 632, ask this Court to reverse it.

Our power to do so is explicitly challenged by the United States as *amicus curiae*, but would in any event have to be faced. See *Mansfield C. & L. M. Ry. v. Swann*, 111 U. S. 379, 382. To whom and for what causes the courts of Kansas are open are matters for Kansas to determine.³ But Kansas can not define the contours of the authority of the federal courts, and more particularly of this Court. It is our ultimate responsibility to determine who may invoke our judgment and under what circumstances. Are these members of the Kansas legislature, therefore, entitled to ask us to adjudicate the grievances of which they complain?

It is not our function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency. See the correspondence between Secretary of State Jefferson and Chief Justice Jay, 3 Johnson, Correspondence and Public Papers of John Jay, 486-89. Unlike the rôle allowed to judges in a few state courts and to the Supreme Court of Canada, our exclusive business is litigation.⁴ The

³ This is subject to some narrow exceptions not here relevant. See, e. g., *McKnitt v. St. Louis & San Francisco Ry.*, 292 U. S. 230.

⁴ As to advisory opinions in use in a few of the state courts, see J. B. Thayer, *Advisory Opinions*, reprinted in *Legal Essays* by J. B. Thayer, at 42 *et seq.*; article on "Advisory Opinions," 1 Enc. Soc. Sci. 475. As to advisory opinions in Canada, see *Attorney-General for Ontario v. Attorney-General for Canada* [1912] A. C. 571. Speaking of the Canadian system, Lord Chancellor Haldane, in *Attorney General for British Columbia v. Attorney General for Canada* [1914] A. C. 153, 162, said: "It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies." For further animadversions on advisory pronouncements by judges, see Lord Chancellor Sankey in *In re The Regulation and Control of Aeronautics in Canada* [1932] A. C. 54, 66: "We sympathize with the view expressed at length by Newcombe, J., which was concurred in by the Chief Justice

requisites of litigation are not satisfied when questions of constitutionality though conveyed through the outward forms of a conventional court proceeding do not bear special relation to a particular litigant. The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined.⁵ No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all. *Stearns v. Wood*, 236 U. S. 75; *Fairchild v. Hughes*, 258 U. S. 126.

In the familiar language of jurisdiction, these Kansas legislators must have standing in this Court. What is their distinctive claim to be here, not possessed by every Kansan? What is it that they complain of, which could not be complained of here by all their fellow citizens? The answer requires analysis of the grievances which they urge.

They say that it was beyond the power of the Kansas legislature, no matter who voted or how, to ratify the Child Labor Amendment because for Kansas there was no Child Labor Amendment to ratify. Assuming that an amendment proposed by the Congress dies of inanition after what is to be deemed a "reasonable" time, they claim that, having been submitted in 1924, the proposed Child Labor Amendment was no longer alive in 1937. Or, if alive, it was no longer so for Kansas because, by a prior resolution of rejection

[of Canada] as to the difficulty which the Court must experience in endeavoring to answer questions put to it in this way."

Australia followed our Constitutional practice in restricting her courts to litigious business. The experience of English history which lay behind it was thus put in the Australian Constitutional Convention by Mr. (later Mr. Justice) Higgins: "I feel strongly that it is most inexpedient to break in on the established practice of the English law, and secure decisions on facts which have not arisen yet. Of course, it is a matter that lawyers have experience of every day, that a judge does not give the same attention, he can not give that same attention, to a supposititious case as when he feels the pressure of the consequences to a litigant before him. . . . But here is an attempt to allow this High Court, before cases have arisen, to make a pronouncement upon the law that will be binding. I think the imagination of judges, like that of other persons, is limited, and they are not able to put before their minds all the complex circumstances which may arise and which they ought to have in their minds when giving a decision. If there is one thing more than another which is recognized in British jurisprudence it is that a judge never gives a decision until the facts necessary for that decision have arisen." Rep. Nat. Austral. Conv. Deb. (1897) 966-67.

⁵ See the series of cases beginning with *Hayburn's Case*, 2 Dall. 409, through *United States v. West Virginia*, 295 U. S. 463.

in 1925, Kansas had exhausted her power. In no respect, however, do these objections relate to any secular interest that pertains to these Kansas legislators apart from interests that belong to the entire commonalty of Kansas. The fact that these legislators are part of the ratifying mechanism while the ordinary citizen of Kansas is not, is wholly irrelevant to this issue. On this aspect of the case the problem would be exactly the same if all but one legislator had voted for ratification.

Indeed the claim that the Amendment was dead or that it was no longer open to Kansas to ratify, is not only not an interest which belongs uniquely to these Kansas legislators; it is not even an interest special to Kansas. For it is the common concern of every citizen of the United States whether the Amendment is still alive, or whether Kansas could be included among the necessary "three-fourths of the several States."

These legislators have no more standing on these claims of unconstitutionality to attack "Senate Concurrent Resolution No. 3" than they would have standing here to attack some Kansas statute claimed by them to offend the Commerce Clause. By as much right could a member of the Congress who had voted against the passage of a bill because moved by constitutional scruples urge before this Court our duty to consider his arguments of unconstitutionality.

Clearly a Kansan legislator would have no standing had he brought suit in a federal court. Can the Kansas Supreme Court transmute the general interest in these constitutional claims into the individualized legal interest indispensable here? No doubt the bounds of such legal interest have a penumbra which gives some freedom in judging fulfilment of our jurisdictional requirements. The doctrines affecting standing to sue in the federal courts will not be treated as mechanical yardsticks in assessing state court ascertainments of legal interest brought here for review. For the creation of a vast domain of legal interests is in the keeping of the states, and from time to time state courts and legislators give legal protection to new individual interests. Thus, while the ordinary state taxpayer's suit is not recognized in the federal courts, it affords adequate standing for review of state decisions when so recognized by state courts. *Coyle v. Smith*, 221 U. S. 559; *Heim v. McCall*, 239 U. S. 175.

But it by no means follows that a state court ruling on the adequacy of legal interest is binding here. Thus, in *Tyler v. Judges*

of the Court of Registration, 179 U. S. 405, the notion was rejected that merely because the Supreme Judicial Court of Massachusetts found an interest of sufficient legal significance for assailing a statute, this Court must consider such claim. Again, this Court has consistently held that the interest of a state official in vindicating the Constitution of the United States gives him no legal standing here to attack the constitutionality of a state statute in order to avoid compliance with it. *Smith v. Indiana*, 191 U. S. 138; *Braxton County Court v. West Virginia*, 208 U. S. 192; *Marshall v. Dye*, 231 U. S. 250; *Stewart v. Kansas City*, 239 U. S. 14. Nor can recognition by a state court of such an undifferentiated, general interest confer jurisdiction on us. *Columbus & Greenville Ry. v. Miller*, 283 U. S. 96, reversing *Miller v. Columbus & Greenville Ry.*, 154 Miss. 317. Contrariwise, of course, an official has a legally recognized duty to enforce a statute which he is charged with enforcing. And so, an official who is obstructed in the performance of his duty under a state statute because his state court found a violation of the United States Constitution may, since the Act of December 23, 1914, 38 Stat. 790, ask this Court to remove the fetters against enforcement of his duty imposed by the state court because of an asserted misconception of the Constitution. Such a situation is represented by *Blodgett v. Silberman*, 277 U. S. 1, and satisfied the requirement of legal interest in *Boynton v. Hutcheson*, 291 U. S. 656, *certiorari* dismissed on another ground in 292 U. S. 601.⁶

⁶ A quick summary of the jurisdiction of this Court over state court decisions leaves no room for doubt that the fact that the present case is here on *certiorari* is wholly irrelevant to our assumption of jurisdiction. Section 25 of the First Judiciary Act gave reviewing power to this Court only over state court decisions *denying* a claim of federal right. This restriction was, of course, born of fear of disobedience by the state judiciaries of national authority. The Act of September 6, 1916, 39 STAT. 726, withdrew from this obligatory jurisdiction cases where the state decision was against a "title, right, privilege, or immunity" claimed to exist under the Constitution, laws, treaties or authorities of the United States. This change, which was inspired mainly by a desire to eliminate from review as of right of cases arising under the Federal Employers' Liability Act, left such review only in cases where the validity of a treaty, statute or authority of the United States was drawn into question and the decision was against the validity; and in cases where the validity of a statute of a state or a state authority was drawn into question on the grounds of conflict with federal law and the decision was in favor of its validity. The Act of February 13, 1925, 43 STAT. 936, 937, extended this process of restricting our obligatory jurisdiction by transferring to review by *certiorari* cases in which the state court had held invalid an "authority" claimed to be exercised under the laws of the United States or in which it had upheld, against claims of invalidity on federal grounds, an "authority" exercised under the laws of the states. Neither the terms of these two restrictions nor the controlling comments in committee reports or by members of this Court who had a special share in promoting the Acts of 1916 and 1925, give any

We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it. The Kansas legislators could not bring suit explicitly on behalf of the people of the United States to determine whether Kansas could still vote for the Child Labor Amendment. They can not gain standing here by having brought such a suit in their own names. Therefore, none of the petitioners can here raise questions concerning the power of the Kansas legislature to ratify the Amendment.

This disposes of the standing of the three members of the lower house who seek to invoke the jurisdiction of this Court. They have no standing here. Equally without litigious standing is the member of the Kansas Senate who voted for "Senate Concurrent Resolution No. 3". He cannot claim that his vote was denied any parliamentary efficacy to which it was entitled. There remains for consideration only the claim of the twenty nay-voting senators that the Lieutenant-Governor of Kansas, the presiding officer of its Senate, had, under the Kansas Constitution, no power to break the tie in the senatorial vote on the Amendment, thereby depriving their votes of the effect of creating such a tie. Whether this is the tribunal before which such a question can be raised by these senators must be determined even before considering whether the issue which they pose is justiciable. For the latter involves questions affecting the distri-

support for believing that by contracting the range of obligatory jurisdiction over state adjudications Congress enlarged the jurisdiction of the Court by removing the established requirement of legal interest as a threshold condition to being here.

Nor does the Act of December 23, 1914, 38 Stat. 790 touch the present problem. By that Act, Congress for the first time gave this Court power to review state court decisions *sustaining* a federal right. For this purpose it made *certiorari* available. The Committee reports and the debates on this Act prove that its purpose was merely to remove the unilateral quality of Supreme Court review of state court decisions on constitutional questions as to which this Court has the ultimate say. The Act did not create a new legal interest as a basis of review here; it built on the settled doctrine that an official has a legally recognizable duty to carry out a statute which he is supposed to enforce.

Thus, prior to the Act of 1914, the Kentucky case, *post*, p. —, could not have come here at all, and prior to 1916, the Kansas case would have come here, if at all, by *writ of error*. By allowing cases from state courts which previously could not have come here at all to come here on *certiorari* the Act of 1914 merely lifted the previous bar—that a federal claim had been sustained—but left every other requisite of jurisdiction unchanged. Similarly, no change in these requisites was affected by the Acts of 1916 and 1925 in confining certain categories of litigation from the state courts to our discretionary instead of obligatory reviewing power.

bution of constitutional power which should be postponed to preliminary questions of legal standing to sue.

The right of the Kansas senators to be here is rested on recognition by *Leser v. Garnett*, 258 U. S. 130 of a voter's right to protect his franchise. The historic source of this doctrine and the reasons for it were explained in *Nixon v. Herndon*, 273 U. S. 536, 540. That was an action for \$5,000 damages against the Judges of Elections for refusing to permit the plaintiff to vote at a primary election in Texas. In disposing of the objection that the plaintiff had no cause of action because the subject matter of the suit was political, Mr. Justice Holmes thus spoke for the Court: "Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*, 2 Ld. Raym. 938, 3 *id.* 320, and has been recognized by this Court."

"Private damage" is the clue to the famous ruling in *Ashby v. White*, *supra*, and determines its scope as well as that of cases in this Court of which it is the justification. The judgment of Lord Holt is permeated with the conception that a voter's franchise is a personal right, assessable in money damages, of which the exact amount "is peculiarly appropriate for the determination of a jury", see *Wiley v. Sinkler*, 179 U. S. 58, 65, and for which there is no remedy outside the law courts. "Although this matter relates to the parliament," said Lord Holt, "yet it is an injury pre-cedaneous to the parliament, as my Lord Hale said in the case of *Bernardiston v. Soame*, 2 Lev. 114, 116. The parliament cannot judge of this injury, nor give damage to the plaintiff for it: they cannot make him a recompense." 2 Ld. Raym. 938, 958.

The reasoning of *Ashby v. White* and the practice which has followed it leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts. The procedures for voting in legislative assemblies—who are members, how and when they should vote, what is the requisite number of votes for different phases of legislative activity, what votes were cast and how they were counted—surely are matters that not merely concern political action but are of the very essence of political action, if "political" has any connotation at all. *Field v. Clark*, 143 U. S. 649, 670, *et seq.*; *Leser v. Garnett*, 258 U. S. 130, 137. In no sense are they matters of "private damage". They pertain to

legislators not as individuals but as political representatives executing the legislative process. To open the law courts to such controversies is to have courts sit in judgment on the manifold disputes engendered by procedures for voting in legislative assemblies. If the doctrine of *Ashby v. White* vindicating the private rights of a voting citizen has not been doubted for over two hundred years, it is equally significant that for over two hundred years *Ashby v. White* has not been sought to be put to purposes like the present. In seeking redress here these Kansas senators have wholly misconceived the functions of this Court. The writ of *certiorari* to the Kansas Supreme Court should therefore be dismissed.

Mr. Justice BUTLER, dissenting.

The Child Labor Amendment was proposed in 1924; more than 13 years elapsed before the Kansas legislature voted, as the decision just announced holds, to ratify it. Petitioners insist that more than a reasonable time had elapsed and that, therefore, the action of the state legislature is without force. But this Court now holds that the question is not justiciable, relegates it to the "consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States the time arrives for the promulgation of the adoption of the amendment" and declares that the decision by Congress would not be subject to review by the courts.

In *Dillon v. Gloss*, 256 U. S. 368, one imprisoned for transportation of intoxicating liquor in violation of § 3 of the National Prohibition Act, instituted habeas corpus proceedings to obtain his release on the ground that the Eighteenth Amendment was invalid because the resolution proposing it declared that it should not be operative unless ratified within seven years. The Amendment was ratified in less than a year and a half. We definitely held that Article V impliedly requires amendments submitted to be ratified within a reasonable time after proposal; that Congress may fix a reasonable time for ratification, and that the period of seven years fixed by the Congress was reasonable.

We said:

"It will be seen that this article says nothing about the time within which ratification may be had--neither that it shall be un-

limited nor that it shall be fixed by Congress. What, then, is the reasonable inference or implication? Is it that ratification may be had at any time, as within a few years, a century or even a longer period; or that it must be had within some reasonable period which Congress is left free to define?

"We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson [in his Constitutional Conventions, 4th ed. § 585] 'that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810, and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference

or implication from Article V is that the ratification must be within some reasonable time after the proposal.

"Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt.

Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

Upon the reasoning of our opinion in that case, I would hold that more than a reasonable time had elapsed* and that the judgment of the Kansas supreme court should be reversed.

*CHRONOLOGY OF CHILD LABOR AMENDMENT.

[A State is said to have "rejected" when both Houses of its legislature passed resolutions of rejection; and to have "refused to ratify" when both Houses defeated resolution for ratification.]

June 2, 1924, Joint Resolution deposited in State Department. In that year, Arkansas ratified; North Carolina rejected. *Ratifications, 1; rejections, 1.*

1925, Arizona, California and Wisconsin ratified; Florida, Georgia, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Vermont rejected; Connecticut, Delaware and South Dakota refused to ratify. *Ratifications, 4; rejections, 16; refusals to ratify, 3.*

1926, Kentucky and Virginia rejected. *Ratifications, 4; rejections, 18; refusals to ratify, 3.*

1927, Montana, ratified; Maryland rejected. *Ratifications, 5; rejections, 19; refusals to ratify, 5.*

1931, Colorado ratified. *Ratifications, 6; rejections, 19; refusals to ratify, 3.*

1933, Illinois, Iowa, Michigan, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Washington and West Virginia ratified, as did also Maine, Minnesota, New Hampshire, and Pennsylvania, which had rejected in 1925. *Ratifications, 20; rejections, (eliminating States subsequently ratifying) 15; refusals to ratify, 3.*

1935, Idaho and Wyoming ratified, as did Utah and Indiana, which had rejected in 1925. As in 1925, Connecticut refused to ratify. *Ratifications, 24; rejections, 18; refusals to ratify, 3.*

1936, Kentucky, which had rejected in 1926, ratified. *Ratifications, 25; rejections, 18; refusals to ratify, 3.*

1937, Nevada and New Mexico ratified, as did Kansas, which had rejected in 1925. Massachusetts, which had rejected in 1925, refused to ratify. *Ratifications, 28; rejections, 11; refusals to ratify, 3.*

Six* States are not included in this list: Alabama, Louisiana, Mississippi, Nebraska, New York and Rhode Island. It appears that there has never been

The point, that the question—whether more than a reasonable time had elapsed—is not justiciable but one for Congress after attempted ratification by the requisite number of States, was raised by the parties or by the United States appearing as *amicus curiae*; it was not suggested by us when ordering reargument. The Court, in the *Dillon* case, did directly decide upon the reasonableness of the seven years fixed by the Congress, it ought not now without hearing argument upon the point, hold itself to lack power to decide whether more than 13 years between proposal by Congress and attempted ratification by Kansas is reasonable.

Mr. Justice McREYNOLDS joins in this opinion.

a vote in Alabama or Rhode Island. Louisiana house of representatives three times (1924, 1934 and 1936) defeated resolutions for ratification. Mississippi, the Senate adopted resolution for ratification in 1934, but in 1936 another Senate resolution for ratification was adversely reported. In Nebraska the House defeated ratification resolution in 1927 and 1935, but the Senate passed such a resolution in 1929. In New York, ratification was defeated in the House in 1935 and 1937, and in the latter year, the Senate passed such a resolution.

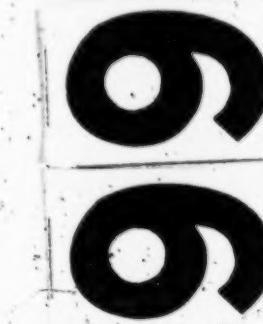
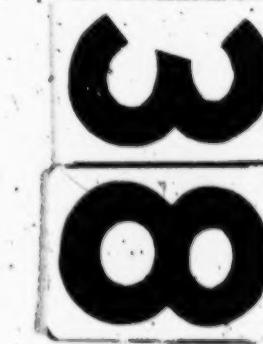
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